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REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS

OF

UPPER CANADA;

FROM TRINITY TERM, 17 VICTORIA, TO HILARY TERM, 18 VICTORIA.

BY

EDWARD C. JONES, Esq.

BARRISTER-AT-LAW.

VOLUME IV.

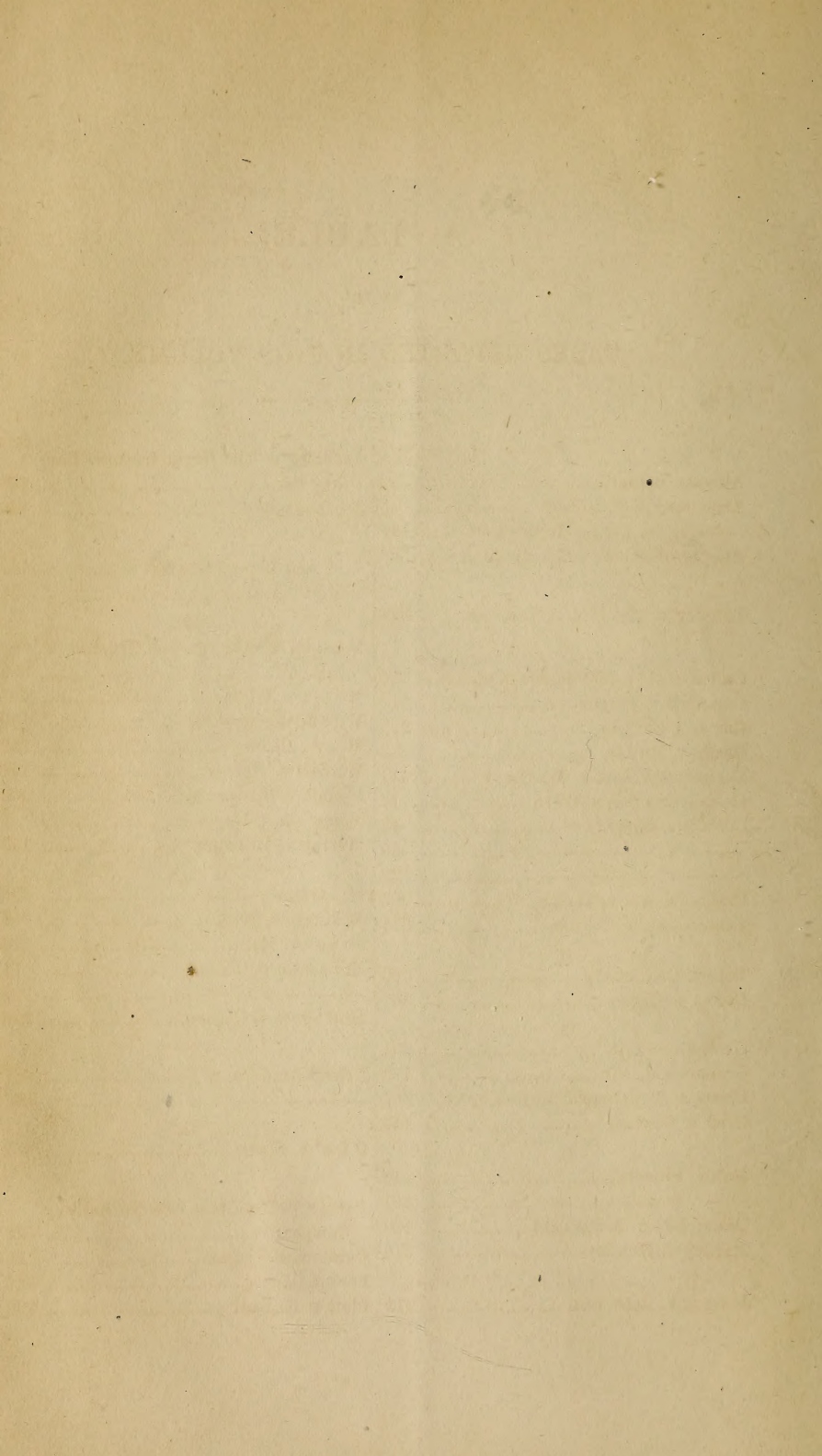
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J U D G E S
OF
THE COURT OF COMMON PLEAS
DURING THE PERIOD OF THESE REPORTS.

THE HON. JAMES BUCHANAN MACAULAY, *Chief Justice.*

“ “ ARCHIBALD McLEAN.

“ “ WILLIAM BUELL RICHARDS.

REPORTS OF CASES.

IN THE

COURT OF COMMON PLEAS.

TRINITY TERM, 17 VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.
“ “ MR. JUSTICE MCLEAN.
“ “ MR. JUSTICE RICHARDS.

WM. MONAGHAN V. M. P. HAYES ET AL.

To a declaration in trover the defendants pleaded that the plaintiff became indebted to them for goods; that he absented himself, leaving his wife to manage his business; that she delivered the goods in question to defendants towards the payment of plaintiff's debt to them, and that defendants, after the receipt of said goods, delivered the same to one Roe, to be by him kept for defendants; and that the said Roe, before the time when, &c., delivered these goods to plaintiff, wherefore defendants took said goods from plaintiff, which is the conversion complained of.

Held bad, as not confessing a sufficient colorable title in plaintiff, and as amounting to an argumentative denial that plaintiff was possessed as of his own property, and because the facts stated in the plea could have been given in evidence under the general issue.

Appeal from the decision of the judge of the County Court of the united Counties of York, Ontario and Peel, on a demurrer to two of defendants' pleas. The action in the County Court was trover for certain goods of plaintiff. The defendants pleaded, first, not guilty; second, plaintiff not possessed; third, plaintiff carrying on business in Toronto, became indebted to defendants for goods: that he absented himself from his said business, leaving his wife as his agent to manage the same and matters incident thereto: that defendants claiming payment of their debt then due, it was agreed between plaintiff's wife and defendants that the goods in question should be taken and received by the defendants for the sum of £30 towards the payment of the debt due to them by plaintiff, and that defendants, in pursuance of such agreement, did receive

and take the said goods and chattels at £30, towards payment and satisfaction of so much of plaintiff's debt to them: that after receiving and taking the said goods and chattels, and before the said time when &c., to wit, &c., defendants delivered the said goods and chattels to one Richard Roe, to be kept by him for the use of the defendants; and that Richard Roe, before the said time when &c., to wit, &c., delivered the said goods and chattels to the plaintiff; wherefore defendants, at the said time, took the said goods and chattels from and out of the possession of plaintiff, as they lawfully might do, for the cause aforesaid, *which taking last aforesaid* is the same conversion and disposition in the declaration mentioned.

Fourth special plea—the same in substance, and giving colour, as in the third.

To these pleas the plaintiff demurred, on the ground that they do not confess a sufficient colourable title in plaintiff to enable him to maintain his action; and that each of the pleas amounts to an argumentative denial that the plaintiff at the time of the conversion was possessed of, or entitled to the goods and chattels in the declaration mentioned *as of his own property*; and because the whole facts stated in the pleas can be given in evidence under the plea of not possessed, and the pleas only amount to a circuitous denial of the allegations in the declaration as to plaintiff's right to the possession of the goods at the time of the alleged conversion.

After argument the learned judge of the County Court gave judgment in favour of the plaintiff on the demurrers; and in his judgment, as certified, he held, that defendants could have all the advantages sought to be obtained by the pleas under a general denial of possession, except to confine the plaintiff in his replication to only one specific fact of those set forth in the pleas.

The defendants appeal from his decision; and on the argument,

Leith, for the appellants, admitted that the special matter pleaded might be given in evidence under the plea of not possessed, but contended it might nevertheless be pleaded

specially as being matter of law within the rule of exceptions.—Carr v. Hinchliff, 4 B. & C. 547; 1½ Moore and Payne, 308; Hayselden v. Staff, 5 A. & E. 160-1; Morant v. Sign, 2 M. & W. 95; Weeding v. Aldrich, 9 A. & E. 861, S. C. 1 P. & D.

That its being an argumentative denial of the plaintiff's possession cannot be objected to the facts pleaded, which admit it until the act done which constituted the conversion. *Acraman v. Cooper*, 10 M. & W. 592.

That the conversion confessed is actual and not merely evidence thereof, which distinguishes the cases.—*Unwin v. St. Quintin*, 11 M. & W. 277; *Ward v. Robins*, 15 M. & W. 257; *Fancourt v. Bull*, 1 Bing. N. S. 689; *Cooper v. Shepard*, 15 L. J. C. P. 237; Ch. Jn. Precedents 665, recommends such plea.

That the express colour is immaterial and may be struck out, and the plea may be good without it—*Fyson v. Chambers*, 9 M. & W. 463; *Taylor v. Eastwood*, 1 East 212-3; Yel. 174.

Geo. Duggan, for respondents, contended the decision of *Harrison J.* was correct; that the declaration alleged the plaintiff to be possessed as of his own property, and the plea only argumentatively denied it, instead of being not possessed *modo et formâ*, as it should have been.

That the object of the plea is to force the plaintiff to take issue upon one part to the admission of the other, though neither be true, and both of which might be contested under a proper plea of not possessed.

That it could not all be put in issue without a double replication.—*Gough v. Bryan*, 2 M. & W. 773; 7 Dow. 516; *Fyson v. Chambers*, 9 M. & W. 463; *Bingham v. Clements*, 12 Q. B. 260.

That a defendant cannot confess and avoid in trover, and the plea therefore is pleading evidence instead of traversing.—1 Ch. Pld. 552.

Leith, in reply, cited *Ward v. Blunt*, Cro. El. 146.

MACAULAY C. J.—The difficulty of this case has arisen from the fluctuation of the decisions in England upon the

subject of pleading specially in confession and avoidance and giving colour in actions of trover.

The new rules provided, in relation to actions on the case generally, that the plea of not guilty should operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and that no other defence than such denial should be admissible under that plea, and that all other pleas in denial should take issue on some particular matter of fact alleged in the declaration; and among other illustrations there given, it is stated that in an action for converting the plaintiff's goods, not guilty will operate as a denial only of the conversion, and not the plaintiff's title to the goods. They also provide that all matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit, which says that in every species of assumpsit all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transactions to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.

In trespass *de bonis asportatis* the plea of not guilty operates as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein. These new rules have given rise to the two separate traverses or pleas of not guilty and not possessed.

In the exposition of the new rules it was laid down in the case of *Stancliff v. Hardwicke* (5 Tyr. 551, S. C. 2 C. M. & R. 1), that the plea of not guilty in trover denied the alleged conversion in fact only and not in wrongfulness, and this for a long time was considered the correct view; and many cases appear in the books in which special pleas in confession and avoidance and giving colour, have been adopted and treated as the correct if not the only admissible mode of pleading, when a conversion in fact of the goods in question was admitted and sought to be justified; it was afterwards said the two pleas of not guilty and not possessed amounted together to the old plea of not guilty, and that

all matters of defence formerly admissible under the last, are now proveable under one or other of the two that have been substituted.—Whitmore v. Green (13 M. & W. 107.)

Subsequently it has been held that the term conversion in trover bears a technical import, and implies a wrongful conversion of the plaintiff's goods; wherefore a plea admitting the plaintiff's title to the goods could not confess and avoid such a conversion of them, and that if the plaintiff's title was intended to be denied, it should be traversed by the plea of not possessed.

It seems, therefore, to be at present considered that a special plea of affirmative matter justifying the conversion complained of, whether it respect the conversion of the goods or the plaintiff's right and title thereto, cannot be pleaded, because such matter must amount to an argumentative plea of not guilty or of not possessed, and which ought to be adopted as being a direct form of traverse, and as avoiding the inconsistency of confessing the wrongfulness of the conversion of the goods, to which a *prima facie* or colourable title must be also confessed in the plaintiff, and which, if so, cannot be justified or avoided in point of law.

It seems to be now considered that under the plea of not guilty, anything (irrespective of the plaintiff's title to the goods) which shews that the conversion (though of his goods) was not wrongful may be proved; and that under the plea of not possessed, anything may be proved which shews that at the time of the conversion the plaintiff was not entitled to the possession.

Trover is defined by Lord Mansfield to be in form a fiction, in substance a remedy to recover the value of personal chattels *wrongfully converted* by another to his own use; and he said that the form supposed the defendant might have come lawfully by the possession of the goods, and that the whole test consisted in the wrongful conversion, which was the gist of the action.—Cooper v. Chitty (1 Bur. 20, 37, S. C. 1 W. B. 66).

In White v. Teal (12 A. & E. 106), Patterson J. (referring to Gordon v. Harper, (7 T. R. 9)), said the declaration in

trover admits a lawful possession in the defendant at the time of the conversion, but claims a right of possession for the plaintiff and then complains of a conversion by the defendant, which shews that the plaintiff asserts a right of possession at the time of the conversion, which was the principle of *Gordon v. Harper*, in which it was held that to maintain trover the plaintiff must have a right of property in the thing and a right of possession, and that unless both these rights concurred, the action would not lie; in other words, not unless the goods converted were in the actual or implied rightful possession of the plaintiff.

In *Lake v. Loveday* (4 M. & G. 973), Maule J. said, that in trover the plaintiff seeks to recover for the wrongful conversion of property which he admits to have come lawfully into the possession of the defendant; that the allegation in the declaration is, that the plaintiff was lawfully possessed of the goods as of his own property, and the effect of denying that averment is to raise a question whether plaintiff has such a title as will enable him to maintain an action of trover in respect of it.

The declaration does not in terms allege a wrongful conversion, but merely a conversion; and the plea of not guilty does not deny in so many words the wrongful conversion, but merely the grievances or premises in manner and form alleged. However, both the declaration and plea, no doubt, impliedly include wrongfulness in legal intentment.

To maintain trover, actual possession is a sufficient title against a wrong-doer, as it confers a right of possession as against him: this seems to be the result of the authorities, though Parke B. has expressed doubts on the subject.—See *Fyson v. Chambers* (9 M. & W. 466-7); *Latch*, 186-7, per *Dodrige J.* Or right of property and right of possession, denying to the plaintiff possession in construction of law, will of course be sufficient, and is more consistent with the principles upon which the declaration in trover is framed.—*Cro. El.* 218, *Minshall v. Lloyd* (2 M. & W. 459), *Isaac v. Belcher* (5 M. & W. 139), *Legg v. Evans* (6 M. & W. 41), *Fouldes v. Willoughby* (8 M. & W. 545), *Fyson v. Chambers* (9 M.

& W. 463-5), Mason v. Farnell (12 M. & W. 674, 680), Milgate v. Kebble (3 M. & G. 101), Ray v. Hirst (9 Q. B. 592), Davison v. Wilson (11 Q. B. 891), Lake v. Loveday (5 Scott 923, S. C. 2 Dow. P. C. 633).

Before the new rules the nature of the action of trover being on the case as distinguished from trespass *de bonis &c.*, allowed to the plea of not guilty a more extensive effect in admitting the special matter in evidence than under a like plea in trespass upon grounds not necessary to be here explained, and in trover that plea put in issue both the conversion and the plaintiff's right to maintain trover therefor; and we find it laid down at a remote day and often repeated, that there was no plea in trover but not guilty or a release.—1 Keb. 305; Doe v. Carridan (Yel. 117), Priestly v. White (2 Sal. 654, 2 Bul. 134-5, 1 Lord Raymond 393), Hartford v. Jones (3 Sal. 365, 405), Cro. El. 146; Cro. El. 433-4), Agar v. Lisle (Hob. 187).

And special pleas in confession and avoidance were overruled on the ground that they did not admit a conversion, because the conversion alleged was a wrongful one, not admitted by the facts that justified it or shewed it not to have been wrongful, and if wrongful it could not be admitted without destroying the defence.

On the other hand, we find cases of special pleas in confession and avoidance in trover, some giving implied and others express colour, and such pleas approved of in early times and being before the new rules.—Rockwood v. Feasor (Cro. El. 262), Comyn v. Boyce (Cro. El. 485), Kynnersley v. Barnard (Cro. El. 554-5), Hill v. Hawks (2 Bul. 201, S. C. Rolls R. 44), Stirt v. Drungold (3 Bul. 289), Bellamy v. Balthrop (Latch 186); 1 Vin. Ab. action of Trover L. 5; Com. Dig. action on the case; Trover G. 6; Kenicot v. Bogan Yel. 198-9, S. C. 2 Bul. 250.

The cases, since the new rules, are numerous.—Vernon v. Shipton (2 M. & W. 9), Morant v. Sign (ib. 95), and others.

In the present state of the authorities, and as applicable to this case, it is not necessary to enter upon the question whether the cases do not lay too much stress upon the

wrongfulness of the conversion in trover, and whether such wrongfulness is not a mere inference of law and therefore not traversible; if one man takes or converts to his own use goods which another owns and is possessed of, the act is wrongful in the eye of the law, and trespass or trover may be sustained for such; but the wrongful act alleged is the taking or converting by one of the goods of another; so the entry by one upon the close of another is *prima facie* wrongful and a trespass.

There are other torts for which actions on the case lie, in which the act is not *prima facie* wrongful, and wherein the plaintiff must aver as a fact or in terms equivalent in fact, and therefore traversible, that it was wrongful as mal-practices, mal-arrests, wrongful obstructions of various kinds &c.—*Harvey v. Bridges* (14 M. & W. 437, 440, 1, 3), *Perry v. Fitzhowe* (8 Q. B. 758); 1 Ex. Rep. 262; 14 Ju. 396; *Davison v. Wilson* (11 Q. B. 891), *Burling v. Read* (ib. 904). It is unnecessary to pursue the subject on this occasion.

The cases are consistent, that since the new rules, the plea of not guilty puts in issue only the conversion alleged and not the plaintiff's title, and that whenever the wrongfulness inferred from the proof of a conversion in fact is to be repelled by impeachment of the plaintiff's title, it must be put in issue by the plea of not possessed, which is pleaded not to the conversion but to the property.—*Bingham v. Charles* (12 Ju. 580, per Wightman J.), *Young v. Cowper* (20 L. J. Es. 136, S. C. 3 Ex. R. 259), *Jones v. Davis* (20 L. J. Ex. 433, S. C. 6 Ex. R. 663).

The force attributed to the two pleas of not guilty and not possessed appears just in their general application; it is not so clear when the plaintiff's title to the goods up to the time of the conversion and a conversion thereof in fact, are admitted; as, where a judgment creditor seizes and sells the goods of his debtor, or where (as alleged in the present pleas) the goods of a debtor are delivered to his creditor in satisfaction of the debt.

It may be said, even in such cases, that by the special matter the defendant makes title to himself to the possession

and right to convert the property to his own use.—See *Fyson v. Chambers* (9 M. & W. 460, 468), *Samuel v. Duke* (3 M. & W. 626, 631), and so repel the wrongfulness of the conversion and the plaintiff's right to possession.

But, however, it may remain a question whether an authority or license in law or derived from the plaintiff to take and convert his goods, can be specially pleaded in confession and avoidance (*a*), the weight of authority seems to be against it; and in my view of the present case the pleas seem to be bad on the authority of *Bingham v. Clements* (12 Ju. 580, S. C. 12 Q. B. 260), and the previous cases that led to that decision.

I may also mention *Mayhem v. Herrick* (7 C. B. 229), *Higgins v. Thomas* (8 Q. B. 908), *Freeman v. Cook* (2 Ex. R. 654, S. C. 6 D. & L. 187), in which leave and license was pleaded, and this notwithstanding the express colour given.

The inference from the whole, I think, is, that if a special plea in confession and avoidance in trover does not admit title in the plaintiff or give him sufficient implied colour thereof, it cannot be made good by express colour.

In *Bellamy v. Balthrop* (Latch 185) it is said that in trover every special plea with colour amounts to the general issue. 21 Vin. Ab. 64 says, if in trover, &c., a title is derived from a stranger, it amounted to the general issue, but otherwise if derived from plaintiff—per *Dodridge J.* in *Bellamy v. Balthrop* (Latch 186); or if both plaintiff and defendant make title by the same person, the plea is good.

This bears directly upon the distinction above suggested where the colour is implied.

Against it is the case of *Priestly v. White* (Yel. 174), where the distinction between trespass and trover is pointed out, the one being founded upon a supposed possession without assertion of title, the other upon right of property and right of possession; it is there said that in trover and in all actions where the plaintiff makes title to the thing demanded

(*a*) See Chitty Ju. Forms 673, and notes.

or for which he demands damages, the defendant ought to make a better title to himself and to traverse the plaintiff's title, or otherwise to confess and avoid it. See also the note to the *Am. Edn.* and *Lynnett v. Wood* (Cro. Car. 157); that colour by possession is bad in trover, for it comprehends title in it.—*Wade v. Blunt* (Cro. El. 166), as to which see S. C. 1 Lev. 178.

* The doctrine of colour is discussed in *Leyfield's case* (10 Co. 89, 90, Jenk. 133, Ca. 72, Latch 178), *Paramore v. Johnson* (1 Ld Raymond 567), *Hartfoot v. Jones* (ib. 393), *Com. Dig. Trespass* 3 M. 40, *Carr v. Hinchliff* (4 B. & C. 547, 552), *Stephen's Pleading*, *Clark v. Chamberlain* (2 M. & W. 78), *Howarth v. Tollemache* (4 M. & G. 427), *Chanter v. Leese* (5 M. & W. 703), *Cooper v. Garbett* (13 M. & W. 36), *Ward v. Robins* (15 M. & W. 242).

The objection to it here is, that on the one hand the plaintiff in his declaration alleges a possession in the defendant, in opposition to which, and by way of colour, the defendant pleads that the plaintiff was possessed and both at the times, when &c.

It is true both are fictitious, but on the face of the pleadings each ascribes possession to the other; whereas the gist of the action is not who was actually possessed, but which was entitled to the possession as against the other. Moreover, the defendant does not admit himself to have been a wrong-doer; if he did, his pleas would be bad on that ground.

It seems, therefore, that express colour amounting only to a naked possession as by finding or delivery received from an unauthorized person without right of possession, except as against wrong-doers, does not give to the plaintiff sufficient colour as against the defendant, who makes title to himself, and the plea in the matter of it ought to allow him a *prima facie* or colourable right to the possession as against the defendant.

It is said that where express colour is given unnecessarily it is mere surplusage and may be rejected, and *Taylor v. Eastwood* (1 East 213) is cited as shewing it; but that was a motion in arrest of judgment.

And upon the best consideration, I think the present pleas, if otherwise good, invalidated by the express colour given ; although the colour when properly given cannot be traversed for a very satisfactory reason stated in the note to *Morant v. Sign* (2 M. & W. 96).

Still, on demurrer, the facts stated must be regarded as substantial and true, if material to the plea.

Now here the defendant does not rest his defence upon the delivery of the goods by the plaintiff's authorized agent in satisfaction &c., as the conversion complained of, but goes on to allege a subsequent delivery to Roe after the plaintiff's right of property and possession had been divested and the goods no longer his but the defendant's ; that Roe delivered them back to the plaintiff and then defendant retook them, which was the conversion supposed to be complained of. This gives no colour of title or right of possession to the plaintiff as against the defendant, and if it did it brings the case expressly within *Bingham v. Clements*, *ante*.

It does not appear to me a sufficient answer to say that the former part of the plea gives sufficient implied colour, and that the express colour is mere redundancy ; that might have been a good answer if the defendant had relied upon the delivery by which he acquired the property and right of possession, and the plaintiff lost them, as the conversion supposed and met by the plea, but does not do so, and a subsequent act is relied upon as the conversion meant by the declaration and intended to be answered or justified by the plea. The declaration supposes the defendant to have been possessed before the conversion ; the plea states matter which shews it and that he was so possessed as of his own property, thereby argumentatively denying the plaintiff's title, and then alleges a repossession by the plaintiff and a subsequent dispossession or recaption as the conversion for which the action is brought.

It seems to me, therefore, that we are not called upon to decide whether a plea admitting the express colour and justifying the conversion complained of by a delivery and acceptance as an accord and satisfaction of a subsisting

debt would be a good one as admissible in trover, and sufficient colour of action to the plaintiff as for a conversion of his goods.

I think it satisfactorily shewn by the cases (however inconsistent in themselves) that whenever a right of possession in the plaintiff never existed or ceased before the act of conversion for which the action is brought, the plea of not possessed admits the defence in evidence, and that it should be shewn under that plea, as any special plea would fail to confess a sufficient *prima facie* case.

When, however, there is a conversion in fact of the plaintiff's goods to the defendant's use, by the very act that changes the possession and is relied upon as the conversion, I am not satisfied the special matter may not be pleaded if it must not be pleaded.

It is not so apparent when, as remarked by Lord Abinger in *Fyson v. Chambers* (9 M. & W. 460, 468), it appears that the last act of conversion done was the sale of goods &c., when the dispossession of the plaintiff or the cessation of the plaintiff's right of possession was concurrent, as it were, with the conversion complained of.

In *Samuel v. Duke* (3 M. & W. 626, 31), Parke B. said, "At the moment of the conversion, has not the sheriff the possessory right to the goods," and he distinguishes between the act of seizure and the subsequent sale as constituting separate acts of conversion.—*Leake v. Loveday* (4 M. & G. 983), *Owen v. Knight* (4 Bing. N. S. 54), *Barton v. Brown* (5 M. & W. 298), *White v. Teal* (12 A. & E. 106), *Unwin v. St. Quintin* (11 M. & W. 280–1), *Bradley v. Copley* (1 C. B. 685), *Fim v. Bittlestone* (21 L. J. Ex. 41), *Harrison v. Dixon* (12 M. & W. 142), as to the effect of the plea of not possessed; and see *Purnell v. Young* (3 M. & W. 288), *Whittington v. Boscall* (5 Q. B. 139), *Jones v. Chapman* (2 Ex. R. 803).

As to the effect of the plea of not possessed in trespass to real property, see *Mason v. Farwell* (12 M. & W. 6740).

The subject of colour is discussed in 10 Co. 90, Jenk. 133, case 72, Latch 178, *Howarth v. Tollemache* (4 M. & G. 427), *Cowper v. Garbett* (13 M. & W. 36), *Ward v. Robins*

(15 M. & W. 242), Com. Dig. Trespass, 3 M. 40; Chanter v. Leese (5 M. & W. 703), Morant v. Sign (2 M. & W. 98, note a).

And, when considered, I think it clear that whenever in trover a plea would be bad as not giving express colour, such colour given will not help it; and that if a special plea in confession and avoidance can be pleaded, it must always give implied colour sufficiently, or it will amount to not guilty or not possessed.

My own views would have led me to think that it ought to be pleaded; and if not, that such a plea might, under supposed circumstances, such as the facts contained in the present pleas, give implied colour sufficient to warrant the matter being pleaded specially although admissible in evidence under the plea of not possessed.—Carr v. Hincliff (4 B. & C. 552), and cases already mentioned.

In adopting such a view I should of course consider it sufficient for the plea to admit a *conversion* in fact, and look upon the *wrongfulness* as mere *inference* of law, to be repelled by the special matter pleaded, and which special matter would not controvert or deny expressly or argumentatively any matter of fact upon which the plaintiff could be supposed to rely as constituting the conversion which he complained of as being *wrongful* and for which he brought his action; though of course such special matter of fact might be denied in the replication, or new matter of fact be introduced by way of replication, repelling or displacing such special matter of defence.

The cases bearing upon the points are numerous and conflicting, but it is unnecessary at present to enter into their further consideration.

It may be said, if the pleas are good in substance the defendant is entitled to judgment on the whole record; the answer seems to be that the objection is pointed out as a formal one on special demurrer; and is this, that the defendant, not relying upon his original receipt or taking of the goods as the conversion complained of and justified, states and relies upon a subsequent recaption, which, if true, should have been met by the plea of not possessed, although

that plea may throw upon the plaintiff the onus of proving more than the plaintiff desired to impose.

McLEAN, J.—According to the recent decisions, the pleas of not guilty and not possessed put in issue not merely the property but the *wrongful* conversion by the defendants. They could, upon these pleas, avail themselves of the defence intended to be set up by the special pleas. If, as the defendants allege, the goods were delivered to them by plaintiff's agent in satisfaction of a debt, they could not be guilty of a wrongful conversion by receiving them, and there could be no conversion until they did receive them. The pleas therefore appear to me to amount to an argumentative denial of plaintiff's right at the time of the conversion. Then, again, if it were not so, the defendants by their plea do not confess the property to have been plaintiff's at the time of the conversion, and shew that they had a right to convert it to their own use, but in attempting to give colour they shew by the facts alleged that plaintiff was divested of his right before the conversion, and that at the time of the conversion the goods were in fact those of the defendants, and as such taken out of plaintiff's wrongful possession. All the colour of title allowed to plaintiff is a bare possession without any right, and this is not sufficient to enable him to maintain trover. It appears to me, under these circumstances, that the appeal must be dismissed with costs. The defence intended to be set up under the pleas being declared by the judge in the court below to be still open to the defendants under the pleas remaining on the record, the appeal appears to have been made either to obtain a decision of this court on the matters involved or to avoid the payment of the costs of the demurrer, rather than for the purpose of securing any substantial advantage of which the judgment would deprive the defendants.

Every declaration must complain of some wrong done to the plaintiff; and in trover, though the conversion is not expressly stated to be wrongful, it is in fact the whole wrong complained of. In pleading not guilty there must be

some wrong of which the defendant alleges he is not guilty, and in trover that wrong is the conversion; so that the wrongfulness of the conversion is in fact the matter in issue; the plea of not possessed put in issue the *property*, and it is obvious that if the plaintiff is unable to prove property he cannot recover for what he does not possess. Where a conversion in fact or a wrongful conversion is intended to be contested, the plea of not guilty would appear to be sufficient; but where the property of plaintiff is disputed, then the plea of not possessed is necessary.

There have been various conflicting decisions in England as to the necessity of pleading specially in confession and avoidance facts which tend to shew that the conversion is justifiable; but the result of the more recent decisions is, that the pleas of not guilty and not possessed in trover put everything in issue which it is necessary for a plaintiff to prove to entitle him to recover.

The case of *Bingham v. Clements* is an express authority and very like the present case, and establishes that in trover the plaintiff having proved a taking of goods from his premises by the defendant and a subsequent demand and refusal, the defendant may prove under "not possessed" that the plaintiff's wife, with his authority, gave the goods to defendant in discharge of a debt due to him by the plaintiff.

RICHARDS, J. concurred.

ARMSTRONG V. CAMPBELL.

Crown land receipts—Patents.

The plaintiff brings ejectment on a patent to himself for the south-west half of 12 in the 6th concession of Trafalgar, dated 22nd September 1852. Defendant puts in a receipt for the payment of the first instalment on the said lot, from the commissioner of crown lands, dated 19th July 1851. During the pending of this suit the statute 16 Vic. ch. 159 was passed. *Held*, that the statute 16 Vic. ch. 159 has the effect of repealing all former acts which gave any effect beyond the common law to the receipt, although the act was passed while a suit affected thereby was pending.

Writ tested 3rd March 1852.

Ejectment for south-west half of lot No. 12 in the 6th concession Trafalgar, N. S.

Defendant appears and defends for the north-west three-fourths of the south-west half of the said lot. At the trial, before Burns, J. at the assizes for the united counties of Wentworth and Halton, the plaintiff produced a patent from the crown, dated the 22nd September 1852, to himself, for the south-west half of the lot in question, a clergy reserve, sold to him for £100, reciting the statute 8th Wm. IV., and 4 & 5 Vic., and the contract of sale, and proved a demand of possession on the 1st November last; that there were forty acres cleared worth 10s. an acre yearly rent.

For the defendant a receipt, signed by the Hon. J. H. Price, Commissioner of Crown Lands, dated Crown Lands Office, 19th July 1851, was put in, acknowledging the receipt from John Campbell, per Adam Wilson, Esq., of the sum of £15, being the first instalment on the north-west three-fourths of lot 12, 6th concession Trafalgar, N. S., 150 acres at 20s. per acre, sold to him under order in council of 5th July 1851. Also a writ of possession, issued 25th June 1852, returnable in August following, under which the defendant was put into possession.

The plaintiff's counsel, in reply, offered to prove that such receipt had been rescinded by an order in council, and a sale directed to the plaintiff; also the petition of the defendant to purchase, dated the 14th November 1851, and that the facts therein set forth were not true by another petition of his, dated the 8th October 1852. This evidence was rejected, also the defendant's petition, dated 25th March 1851, and documents attached, also the copy of an award. The defendant's counsel offered to put in a letter of the Commissioner of Crown Lands to Mr. Gilkison, dated 17th July 1849, if the others were received.

It was finally arranged the verdict should be for the plaintiff, with leave to defendant to move to enter it for himself if entitled to recover in the opinion of the court, or that the parties might agree upon a special case, or the court be at liberty to direct the case to be turned into a special verdict, or a special case, as the case may be; and if the evidence rejected be admissible then the court should be at liberty to direct it to be embodied in the special case or verdict.

During Easter Term last, *Wilson*, Q. C. for defendant, obtained a rule upon the plaintiff to shew cause why the verdict should not be set aside and be entered for defendant, pursuant to the leave reserved, upon reading the judge's notes taken at the trial, the record and exhibits.

Springer supported the verdict and shewed cause against the defendant's rule, and contended that the case of *Doe Henderson v. Seymour*, in appeal, did not govern this case, as there no patent had been issued.

That a certificate conferred only an equitable right, and could not be set up against a patent under the great seal, which passed the estate in fee—*Boulton v. Jeffrey* in appeal.

That to maintain ejectment the plaintiff must have a legal and vested interest in the soil, and so the defendant, to resist an ejectment so supported.—*Doe Taylor v. Hurd* ; 2 *Crabb on Real Property*, 1545.

As to the nature of a tenancy at will which, as against the crown, was the utmost interest the defendant could claim under his certificate—*Daintree v. Hutchinson*, 10 M. & W. 94 ; *Riseley v. Ryle*, 11 M. & W. 16 ; *Doe dem. Price v. Price*, 9 Bing. 356 ; *R. & Ryan*, 448, 525.

That he now holds adversely to the patent, which was like a patent to the heir or devisee, under the Heir and Devisee Act, and clothed the plaintiff with seizin in fee.—*Hopkins v. Brown*, 10 U. C. Q. B. R. 127 ; 2 Blk. Com. 145 ; *Chance on Powers* ; *Byers v. Moore*, 5 U. C. Q. B. R. 5 ; *Doe dem. Weisenberger v. McGlennon*, 5 U. C. Q. B. R. 139 ; *Dwarris on the Statutes*, 621.

He distinguished between the mere right or power to maintain ejectment under the certificate against a wrong doer, and a vested legal interest in the land, which the certificate alone did not give nor the statute superadd ; that the statute merely enabled a purchaser holding a certificate to hold possession against adverse claimants, or to eject intruders if ousted by them, without affecting the interest of the crown, legal or equitable ; at all events not creating a title paramount to a grant under the great seal.—11 Rep.

73; Doe dem. Malloch v. H. M. Ordnance, 3 U. C. Q. B. R. 394; Doe Jackson v. Wilkes, 4 U. C. Q. B. R., O. S., 142.

That if available, *prima facie*, the plaintiff might shew the sale and certificate void for fraud and imposition, and ought to have been allowed to do so at the trial. He relied upon the exhibits and their contents as shewing it and fully justifying the government in rescinding the sale to defendant.

Wilson, in reply, expressed his willingness to admit all the exhibits as evidence, if a letter, calling upon the plaintiff to come in and settle or arbitrate, and a report of the commissioner of crown lands, recommending three-fourths of the lot to Bloomfield, be also put in.

Upon the subject of the exhibits three questions arise :

1st. As to the admissibility of any of them to shew fraud in obtaining the sale and receipt held by defendant.

2nd. The effect of any that may be admissible.

3rd. Whether the original certificate can be impeached for fraud in this action and so be avoided, to let in the patent, if not otherwise entitled to prevail.

In consequence of the late statute 16 Vic. ch. 159, passed 14th June 1850, this case was spoken to again.

MACAULAY, C. J., (after reading the statute 16 Vic. chap. 159, secs. 1, 3, 6, 11, 12, 13, 21 & 29.)—This case presents not merely the question whether the statute 16 Vic. is retrospective in its operation or explanatory of the law in relation to the force and effect of receipts, &c., given upon sales of land previously made, but also the question whether the statutes 4 & 5 Vic. ch. 100, and 12 Vic. ch. 31, being thereby repealed, together with so much of any other act or law as might be inconsistent with that act, are to be nevertheless considered as in force, so far as respects the legal rights of the parties litigated in this action.

The cases bearing upon these points are numerous and not quite consistent. I however take the general rule to be, that statutes are not to be construed retrospectively unless made so by the legislature expressly or by necessary implication.—Moon v. Durden, 2 Ex. R. 22; Marsh v. Higgins,

19 L. J. C. P. 297; *McKenzie v. Sligo Railway Company*, and others noted above; and that the alterations of the law by statutes passed "dispendens" will not be construed to affect the rights of the litigant parties except upon like principles. Still I find it very emphatically laid down that statutes repealed cease to operate, and cannot be afterwards acted upon, but are to be regarded as non-existing, whether in relation to matters of substance or form—except as to cases already concluded.—*Surtees v. Ellison*, 9 B. & C. 752; *Kay v. Goodwin*, 6 Bing. 582; *Stevenson v. Oliver*, 8 M. & W. 241; *Simpson v. Ready*, 11 M. & W. 346; *Hall v. Maule*, 8 A. & E. 456; 21 L. J. M. C. 207.

Now here the statutes, which alone gave any effect beyond the common law to the receipt on which the plaintiff relies, have been repealed, and the terms of that repeal, and the whole scope and spirit of the new act, seem to indicate very clearly that the repealed acts were not intended to be saved to give to any of them, even in cases pending, the effect contended for in this case (a).

That the act is retrospective in relation to all outstanding or subsisting certificates or receipts previously granted is clear; for I think the receipts granted by the Commissioner of Crown Lands mentioned in section 29, extends to, and includes receipts granted by district agents appointed under the former statute, as well as by himself personally, and places them upon the same footing as section 11.

As to pending actions, the only saving is in sec. 21, in reference to the 29th sec. of 12 Vic. c. 100.

What seems to prove this view conclusively is the consideration that if judgment were now given for the plaintiff on the ground that, for the purposes of this action, the receipt in question must be considered unrevoked by the order in council on that head, and in force, and the plaintiff entitled to recover under it. Notwithstanding the grant by letters patent to the defendant, the Governor in council could immediately repeal the order of rescission under the late act, and thereby effectually put an end to it for

(a) 6 A. & E. 943, and 16 Jur. 1001.

ever. If this action (though an ejectment) would be final and conclusive between the parties, and estop them, it would not bind the Crown; and after the revocation of the sale to the plaintiff, he could, even though placed in possession under a writ of *Hab. fac. poss*, be removed by an information of intrusion at the suit of the Queen.

McLEAN, J.—Whatever doubt might have existed as to the right of the Crown to confer upon a person, by the making of a patent for lands to him, the right to recover such lands in case of the same having been previously sold by the Commissioner of Crown Lands, that doubt seems to be removed by the clauses to which I have referred, of the act of the last session of parliament chap. 159. The receipt under which defendant claimed and obtained possession is no longer invested with any virtue beyond its being mere *prima facie* evidence of possession for the purpose of any action or suit, and the defendant claiming under it is only to be considered as a tenant at will, the receipt or license of occupation being revoked in effect by the granting of a patent to the plaintiff. The tenancy at will is put an end to also by the patent, and the defendant can no longer assert a right to hold against the crown or its grantee, by virtue of his interest in the land as a purchaser on shewing by his receipt a payment of part of the purchase money. Express authority is reserved in the act to the Governor in council to revoke licenses in case of fraud, and to dispose of the land as if such license had never been issued; that authority appears, by the issuing of the patent to the plaintiff, to have been exercised in this case; and so long as the patent remains in force unrepealed, under the 21st section of the act, the party claiming under it must be entitled to recover and to hold the lands.

The rule in this case must therefore be discharged.

RICHARDS, J., concurred.

RIVERS V. ROE.

Assumpsit.

Plaintiff was teller of a bank, at which a note of defendant's became due. Defendant paid in to plaintiff a sum of money which was afterwards discovered to be £25 short, and plaintiff was compelled to make good the deficiency to the bank.

Held, that plaintiff could recover against the defendant the amount paid by him, in an action for money paid for defendant's use: McLEAN, J., dissentiente.

ASSUMPSIT for money paid by the plaintiff for the defendant at his request. Plea, non-assumpsit.

It was opened by the plaintiff's counsel at the trial that plaintiff was teller of the Bank of Upper Canada in London, C. W., where a bill of defendant's was to be taken up by him; that he paid a sum £25 short; that the plaintiff did not discover the mistake until he made up his cash at the closing of the bank, when he discovered the deficiency, and was satisfied from the circumstances that the defendant had not paid in the full amount by £25, and that, having been obliged to pay the amount to the bank, he had brought this action to recover it back from the defendant; upon which the defendant's counsel moved a non-suit, and the learned judge (McLean, J.) non-suited the plaintiff upon his opening, on the ground that there was no privity nor any contract between the parties from which a promise could be implied, and that the plaintiff could not make the defendant his debtor without his consent.

During last Easter term, *Beecher*, for plaintiff, obtained a rule upon defendant to show cause why such non-suit should not be set aside.

Vankoughnet showed cause and contended the non-suit was right, the payment by defendant being made to the plaintiff's principal and not to him, and no privity existing whence the law could raise an implied request to pay the money, and that the plaintiff could not make the defendant his debtor by the payment as made, especially under circumstances of dispute respecting the fact whether the defendant had not already paid in full.—Chitty, Jr., on Contracts, 510.

Beecher, for plaintiff, contended that there was sufficient privity; that the defendant professed to have paid the plaintiff the full amount of the note, which he received up

as being paid; and that if, through miscounting or other inadvertence, there was a deficiency which the plaintiff was obliged to make good to his principals or the holders of the defendant's note, the law would raise an implied promise to pay from the defendant's duty to make good the deficiency to the plaintiff, who had exonerated him from liability to the holders, who might otherwise have looked to him and sued him for the balance left unpaid. He cited *Jenkins v. Tucker*, 1 H. B. 90.

MACAULAY, C. J.—In *Stokes v. Lewis* (1 T. R. 20 22,) Lord Mansfield says the action for money paid is founded on the express or implied consent of the defendant.

Jenkins v. Tucker, (1 H. B. 90 3 4.)—The defendant was abroad; his wife died, and plaintiff paid the expenses of her funeral. Held, that the action was maintainable, being a duty defendant was legally bound to perform. See *Ambrose v. Kenison* (20 L. J. C. P. 135, S. C. 10 C. B. 776).

Eastwood v. Kenyon (11 A.E. 438).—A pecuniary benefit voluntarily conferred will not sustain an action for money paid.

Exall v. Partridge (8 T. R. 310).—The owner of goods distrained for rent may recover from the lessees as money paid the amount he was compelled to pay the landlord to redeem them.

Child v. Morly (ib. 810).—Lord Kenyon suggests the distinction between voluntary payments and payments by compulsion of monies which the defendant ought to have paid.

Brown v. Hodgson (4 Taunt. 189).—Plaintiff, a carrier, delivered goods of another to defendant, who kept and converted them to his own use, and plaintiff having paid the owner without action recovered against defendant as for money paid to his use. Lord Mansfield, C.J., said plaintiff had paid the money to the person to whom both plaintiff and defendant were bound to pay it, and it was not therefore the case of an officious payment.

Sills et al. v. Laing (4 Camp. 81), conflicts in some measure with the last case. Lord Ellenborough thought the plaintiff should have declared specially on the facts

appearing in evidence, not that he was not entitled to recover at all.

Pownell v. Ferrand (6 B C. 439).—Plaintiff being sued as indorser of a bill paid on the part of defendant, the acceptor was also sued and paid the residue. Held, that plaintiff could recover the amount paid by him as money paid for defendant. Lord Tenterden said (p. 443) the plaintiff was entitled to recover, on the general principle that a man who is *compelled* to pay money which another is *bound by law* to pay is entitled to be reimbursed by the latter, and that money paid under such circumstances might be considered as paid to the use of the person who was bound to pay it. Littledale, J., said it was a general rule that a man who is compelled by process of law to pay money which another is liable to pay, may recover the same in an action for money paid to his use. Holroyd, J., said if the defendant, who was bound to pay, had performed his duty, the plaintiff would not have been called upon by the holder (again), and that having been compelled by law to pay money which the defendant was liable to pay, the law would imply a promise on his part to repay the money; for it was a general rule that he who pays the debt of another by compulsion may recover from him the amount of the debt so paid.

Bayley, J., to the same effect, said,—“If I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay to reimburse;” and the case of *Exall v. Partridge* is approved of.

The difference between the case of *Pownell v. Ferrand* and the present is, that then the plaintiff had become liable through the medium of the bill of exchange, which created a priority and liability on the instrument, while lien there was no priority nor any obligation incurred by the plaintiff at the defendant's request, but that it arose from his own mistake or negligence quite irrespectively of the defendant. In answer, it is said that nevertheless the plaintiff did incur a liability, and that it arose from the defendant's default and failure in duty to pay the whole amount of the note.

Capp v. Topham (6 East 394).—Lord Ellenborough, C.J.,

says, "Where there is mutual error each must take the particular inconvenience on himself which results from his own error;" but he had in contemplation error in mistaking the *law*, not in the *facts*.

Bleaden v. Charles (7 Bing. 246).—A vendee of goods deposited with defendant, the vendor, a bill of exchange accepted by plaintiff, in security; the vendee paid for the goods, but defendant negotiated the bill, and plaintiff was compelled to pay. Held, that he could recover against defendant as for money paid to his use. Tindal, C.J., said the payment had been serviceable to the defendant, and that a priority was created out of the manner in which the defendant received the bill; that there had been a compulsory payment by plaintiff induced by the acts of defendant, &c. The whole of what the learned Chief Justice and other judges said bears upon the present case.

Spencer v. Parry (3 A. & E. 331).—Lord Denman, in holding that assumpsit for money paid did not lie, placed it upon the ground that the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them, the taxes paid by the plaintiff having remained due by the defendant's default, which would give a remedy on the agreement, but were paid to one who had no claim upon him (the defendant), and therefore not to his use.

Grissell v. Robinson (3 Bing. N. S. 10).—Tindal, C.J., said that to recover on the count for money paid the plaintiff must show an express or *implied* assent of *defendant* to the payment of the money, *or* that it was paid upon compulsion for the use of the defendant.

Lubbock v. Tribe (3 M. & W. 613).—Parke, B., lays stress upon the money not being paid on account of defendant at all, and upon the defendant's payment by a cheque afterwards lost exonerating him altogether. He said defendant was only liable on his cheque, but not for money paid because the payment of the money did not exonerate the defendant from any liability at all; it was not money paid to his use, but to the plaintiff's own use, who was bound to make good the amount of the lost cheque, &c. It is to be

observed that in that case the defendant was in no original default, although he had promised to renew the check upon receiving an indemnity, which was sent, but no new check given in return.—*Pitt v. Purssord* (8 M. & W. 538), *Horton v. Riley* (11 M. & W. 492).

Kemp v. Fenden (12 M. & W. 421).—Lord Abinger said, the general principle is that if a man pays money for another which he was liable to pay, *but in which he has himself an interest*, he may maintain an action for money paid.

Brittain v. Lloyd (14 M. & W. 163).—Pollock, C. B., said the request to pay and the payment under it constituted the debt; and whether the request was direct, &c., or indirect, *as when he is placed by him under a liability to pay and does pay, makes no difference*.—*Rodgers v. Man* (15 M. & W. 445), *Cumming v. Bedborough* (15 M. & W. 438.)

Asprey v. Levi (16 M. & W. 821).—Parke, B., said as to *Escall v. Partridge* (8 T. R. 310), the stranger's goods when put by him upon the land became security to the landlord for the tenant who ought to have paid the rent.

Howper v. Treffry (1 Ex. R. 17), bears upon the question of privity.—1 Sand. 264 (e); *Blake v. Hervey* (2 U. C. C. P. R. 310) *Kitson v. Short* (4 U. C. Q. B. R. 220).

Eastwood v. Kenyon (11 A. & E. 438), relates to the sufficiency of consideration and privity to raise an implied promise to pay, &c.—*Cocking v. Ward* (1 C. B. 870) *Petch v. Lyon* (9 Q. B. 147).

Lewis v. Campbell (14 Jurist 397).—The case of *Spencer v. Powes* explained by Wilde, C. J. (S. C. 8 C. B. 541).

Howell v. Batt (5 B. & Ad. 504), was a case in which the agent of a principal remitted by letter to plaintiff less than was due, but stated that the whole sum was enclosed, and the action failed against him for the balance for the want of privity.

Stephens v. Badcock (3 B. & Ad. 354), shows there would be no privity between the owners or holders of the note and the plaintiff, if the bank (whose clerk plaintiff was) were not the holders, but mere agents of another or others to collect

for them.—*Baron v. Husband* (4 B & Adol. 611), on the point of privity.

In the three last cases the actions were against the agent for money had and received by him.

In *Howell v. Batt* (8 C. B. 545), Maule, J., asks, "May it not also be said that when money has been paid under circumstances which make it just and equitable that it should be repaid, it may be recovered back on a count for money paid? Again, that the principle referred to by Baron Parke in *Lubbock v. Tribe* was that where there was no other ground upon which to rest the right to recover the money than the release from a liability, it must, in order to sustain the action, be shown that there has been a release from liability.

Archbold, N. P., 246-7 *White v. Leroux* (M. & M. 347) *Ardean v. Lord Manereue* (Peak, 143) *Pitchen v. Bailey* (8 East 171-2), show the distinction where the plaintiff has been voluntarily guilty of a breach of duty.—*Cross v. Cheshire* (15 Jurist 993).

From the foregoing cases I think it may be deduced that if by contrivance (*Cross v. Cheshire*, 15 Ju. 993) or inadvertence, or by voluntarily undertaking at the request of a debtor, another person incurs a liability, and is compelled to pay money which the debtor was bound to pay and ought to have paid, an implied assent or request may be inferred sufficient to raise a promise in law to reimburse the person paying as for money paid to the debtor's use.

To apply such a rule to the facts suggested by the plaintiff's counsel in the opening of the present case at *Nisi Prius*, it appears the plaintiff was clerk, servant, or agent of the Bank of Upper Canada at London, and as such was intrusted with a bill which the defendant, as acceptor, drawer, or indorser (which not being stated), was bound to pay there; that he made a payment to the plaintiff, supposed to be the full amount, upon which the bill was apparently delivered up to the defendant; but it was afterwards discovered that the sum paid fell short of the full amount by £25, which sum the plaintiff was compelled to pay to his principals, the bank, the ostensible holders of the bill.

Of course we must on this application assume that all the facts necessary to establish such a state of things could be proved; and if proved, it would clearly appear that the plaintiff had been compelled to pay the balance due upon the bill, and which the defendant ought to have paid, the plaintiff having incurred the liability to pay by inadvertently miscounting the monies received in payment of the bill, and surrendering it without being fully paid. He treated it as satisfied, though mistaken in fact, and for all that was suggested the defendant was equally in mistake, and likewise supposed he had paid it in full.

The defendant's liability seems to follow, if, notwithstanding the delivery up of the bill, he still remained liable to the Bank of Upper Canada for the deficiency (*a*); for the plaintiff having become liable to make good the amount, and having been compelled so to do, the defendant has thereby been relieved and exonerated from all further responsibility to the bank, which is paid in full, partly by the defendant, and the residue by the plaintiff virtually on the defendant's behalf.

The defendant paid the plaintiff a sum of money for the bank, as holders of the bill, and as for the full amount thereof, to be of course accounted for by him to them, and the plaintiff delivered up the security as being fully satisfied.

The payment made involved the implied assurance that it was the full amount,—if not equivalent to a guarantee or promise, that it was the full sum; not being so in fact, and the plaintiff having been compelled to make good the deficiency to the bank, I see no violation of legal principles in holding that the law will imply a promise by the defendant to make good as paid to his use a sum which he had previously professed to have actually paid, but had not.

Whether notice of the mistake, and a request by the plaintiff upon defendant to pay the bank before the plaintiff did so, were material, is not at present the question; the precise nature of the transaction, and of the facts attending

(*a*) Byles on Bills, 169, 170.

and following it, are not before us, and we have but to decide upon the general question whether a person compelled to make good a deficiency under circumstances of the nature suggested can obtain reimbursement by an action for money paid.

It appears to me it cannot be said to all agents, clerks, and servants intrusted with the collection of bills or promissory notes, and responsible to their principals or masters for any deficiencies if they part with or deliver up the securities without being paid in full, that, if through any inadvertence or oversight, the payer does not pay the whole, and the agent or servant is compelled to make it good, that the debtor is to retain the benefit of the mistake, and throw the loss upon the innocent party who had *pro tanto* been obliged to pay his debt.

The question, no doubt, is one of difficulty and nicety ; it is also one of general importance in relation to such transactions ; and I cannot persuade myself that the law is so inert as not to afford a remedy when the right to redress is so palpably reasonable and just.

It is not, to my mind, a sufficient answer to say that the principal or master might have sued for the deficient balance, or that the agent or servant might have sued in his name after making good the amount, not as a payment for the debtor, but as curing his own default ; or that the debtor remained still liable, and need not avail himself of the payment made by the agent or servant.

It appears to me that when the agent or servant is compelled to pay the whole amount of the note or bill to the holder, the note or bill is paid, and that he (the holder) could not afterwards sue the maker or acceptor thereon if he choosed to plead and prove such payment ; if he did not, it would be his own forbearance, not the agent's fault who had paid the money.

Nor is it a satisfactory answer that the holder might assign the note or bill to the clerk or servant if negotiable, and enable him to sue thereon. All or any of those things the holder or principal might refuse to do, and then what remedy has the clerk or servant ?

It seems to me that, having been compelled to pay more than he received, owing to the debtor's fault (though arising in one respect from his own negligence, credulity, or inadvertence), natural justice requires the debtor to reimburse him; that the payment made by the agent, clerk, or servant did enure to the debtor's benefit, and discharge him to the principal or holder in point of law; and that it being the plain duty of the debtor to make good (to the intermediate or middle man, as it were) the excess of what he had been obliged to pay beyond the sum received, the law will raise an implied promise on the debtor's part to perform that plain duty. It may be otherwise, but I cannot think so, or that the law is helpless to afford a remedy, and in this form of action, too, for a right so plain.

If there does not exist the right, and the demand is purely a pecuniary one, I think the law would be wanting in the efficacy it is supposed to possess if it did not afford an adequate remedy. I lay no stress upon the bank holding the bill merely for collection, and being agents responsible to the paramount owner. It seems to me that if so it would tend rather to strengthen than to weaken the plaintiff's case.

The transaction seems to me to create a sufficient privity to support the action under the circumstances.

McLEAN, J.—This case came on to be tried before me at the last spring assizes in London, and the plaintiff's counsel (Becher), in his opening to the jury, stated that the action was brought to recover a sum of money paid by the plaintiff to the defendant's use under the following circumstances:—A note of defendant's was in the Bank of Upper Canada at London, in which the plaintiff was acting as teller, and at maturity the defendant called there for the purpose of taking it up. He handed a sum of money to plaintiff for the purpose, and the plaintiff, after looking it over, delivered the note to the defendant. In the evening the plaintiff discovered, in making up his day's account, that he was £25 short in the amount of money which he should have, and supposed that he had paid out that sum too much to a party

who had received money at the bank during the day. In that supposition he went to that party, and, finding the bills paid out in the original parcels, he counted them and found them correct. He was then satisfied that the mistake had arisen in the defendant paying £25 less than the amount of his promissory note, and from plaintiff having counted a parcel of \$1 bills as bills for \$2 each. The plaintiff had been obliged to make good to the Bank of Upper Canada the deficiency, the bank holding him responsible and refusing to look to the defendant, or to have any action brought in its name for the amount. Under these circumstances the defendant, not admitting the mistake to be his, the action was brought to recover the money as so much paid to the defendant's use by plaintiff. The declaration also contained a count on an account stated. On hearing the statement of the plaintiff's case, Mr. Wilson, as counsel for defendant, objected that, according to plaintiff's own showing, the plaintiff had no right to recover as for money paid to the defendant's use or on an account stated; that plaintiff could not make defendant his debtor by paying money without request, and then sue for the amount as if paid by defendant's request; that no request could be implied from the circumstances, there being no privity whatever between the parties; and that in fact the money was paid by plaintiff to the bank,—not to the defendant's use, but to his own use, in order to relieve himself from a responsibility incurred to his employers. On the best consideration which I was then able to give to the matter, I felt obliged to hold that if the facts were as stated by plaintiff's counsel, he could not recover in this action, and the plaintiff, in deference to the opinion then expressed by me, was non-suited.

In Easter Term last *Becher*, for plaintiff, moved for and obtained a rule to show cause why the nonsuit should not be set aside and a new trial granted. Cause was shown during that term by *Vankoughnet*, Q.C., and the case has since remained over for judgment. In consequence of a difference of opinion as the court was then constituted, the matter has been re-argued during the present term, in order that the opinion of a full court may be had on the application.

I have looked very carefully into all the cases which have been cited on either side, and though in many of them I have found dicta which appear to support the right of a party to sustain an action for money paid to the defendant's use in cases similar to the present, on close examination I have also found that these dicta were intended to apply to the particular circumstances of the cases in which they were used. Thus in a recent case in the Exchequer, *Cross v. Cheshire* (7 Exchr. 43), *Pollock*, Ch. B., in delivering judgment says,—“I apprehend it to be perfectly clear that, as a general rule, where *one of two* persons has been compelled to pay the *debt of the other*, his remedy to recover back the money so paid is by an action *for money paid to the defendant's use*, and that *the means by which that mischievous effect has been produced cannot deprive the party of his remedy.*” Now these general remarks would seem to apply to all cases, and might by themselves be taken as an expression of opinion that in all cases where a party has been compelled by any means to pay money which another ought to pay, an action may be maintained as for money paid to the use of such other person. But it is quite clear from the whole tenor of the judgment in that case that they were used only in reference to that particular case; for immediately after the remarks referred to, his Lordship adds,—“If one partner has cheated his fellow-partner through the intervention of a note given in the name of the firm (unless, indeed, the act was felonious) that other partner is entitled to recover against him, as for money paid to his use, the sum paid in satisfaction of an apparent debt of his own created by a fraud on the partnership.” In the same case *Parke*, B., says,—“The defendant having improperly used the partnership name in making the note which he gave for his own private debt, and the plaintiff having been compelled to pay that note, he is entitled to recover the amount so paid from the defendant in the present action. The note was merely *part of the machinery* by which plaintiff was compelled to make the payment.”

In this case it is alleged that the plaintiff has been *compelled* to pay money *for* the defendant, and it may be urged

in the words of Lord Chief Baron Pollock, That the means by which that mischievous effect has been produced cannot deprive the plaintiff of his remedy. It is manifest to me, however, that general expressions used in a case in which they had a plain and obvious meaning, and in which they were strictly applicable, cannot be taken as declaratory of the law in cases like the present, for there is in truth no analogy between them. In the case of *Cross v. Cheshire* the defendant had authority to bind his partner by giving promissory notes, and he took advantage of such authority to bind him by giving a promissory note for a debt of his own—there there was a privity between the parties, and the defendant was under a legal obligation to pay partnership debts. The note on the face of it imported a debt of this nature, and being paid by plaintiff he of course had a right to charge his partner with the amount, and to recover it as so much money paid to his use. In this case there was no privity between plaintiff and defendant—they did not stand in any relation to each other, so that the one had any right or could do any act to bind the other or make him liable to the payment of money. If the plaintiff became liable to pay money it was not in consequence of anything between him and the defendant from which a request to pay can be possibly implied, and without some request no action can be sustained; for it is quite clear, and I take it to be admitted, that the payment of money by a stranger though it may confer a great benefit, and in that sense may be regarded as a payment to the use of another, cannot establish the relation of debtor and creditor between parties so as to confer a right of action. No man by the mere voluntary payment of the debt of another can make such debt payable to himself, unless there is some transferable instrument on which it is founded; but if by operation of law or from any responsibility assumed by one person for another a party is compelled to pay money, a payment so made may fairly be regarded as such a payment to the use of another as to impose an obligation in law for repayment; and a promise to pay where such obligation exists will always be implied. In this case the plaintiff *assumed no*

obligation or liability for the defendant. The liability which fell upon him was not for the defendant but for himself—it was not to pay the *defendant's debt*, but to pay a sum of money equal to it, to make good his own default in the business of his employers. The plaintiff may be considered as saying to the defendant—"You did not pay the whole amount of your note, and as I gave you up that note the Bank of Upper Canada has compelled me to make good the deficiency, and I now sue you to recover the amount which I have become liable for by your not paying, and by my own act." The defendant might well reply—"I asked you to pay no money for me, and if you have paid the money you have paid it to relieve yourself, not me." Under such a state of circumstances, and they are I believe correctly stated, I am utterly at a loss to discover how a request can be said to be implied so that a promise of repayment could arise. There can be no doubt, I apprehend, that the holders of the note could recover the balance due notwithstanding its surrender by the plaintiff, as he alleges, to the defendant. If such an action had been brought and payment pleaded the testimony of plaintiff would have been sufficient to entitle them to recover, shewing that in fact only part of the amount had been paid, and that the note had been given up by mistake. If the bank, as the holders for themselves or for another, chose, instead of bringing such action or allowing their name to be used in it, to make the plaintiff responsible, as for a default in the performance of his duty, and the plaintiff to maintain his position chose to pay the amount, I cannot see that the course of dealing between them, to which the defendant was a stranger, could confer upon the plaintiff any right to sue as for money paid *at the request* of the defendant. The bank had no remedy against plaintiff *on the note*; they would only make him responsible for any deficiency in any monies which through him they were entitled to receive by threatening to remove him from his situation, or by having recourse to the security which he may have given for the proper discharge of his duties. If the plaintiff could not sue in his own name when the mistake was discovered (and I do not see

how he could) then how could the payment of a sum of money afterwards to relieve himself with the bank bring to him a right which he did not previously possess? Suppose the plaintiff after the alleged discovery had informed the defendant of the deficiency in his payment, and the defendant before any payment made to the bank had expressly denied the existence of any such deficiency or any liability on his part to make it good, could the plaintiff, after paying the bank in the face of such repudiation, sue as for money *paid on request*? I apprehend he could not; and for the plain reason that a request under such circumstances could not possibly be implied. The payment would be regarded as made *not by request but against* the wishes of the defendant; and there being no legal obligation no cause of action on an implied promise to pay could arise. If the note, instead of having been given up to the defendant on the presumption that it was paid, had been lost while in plaintiff's custody, with a special indorsement on it so that it could only be collected by the Bank of Upper Canada as the indorsees, and the bank, instead of calling on the defendant for payment, had chosen to say to the plaintiff that they would hold him responsible for his default, and he had been thus compelled, as in this case, to pay the amount, could the plaintiff recover from the defendant, either upon the note or for money paid *on his request*? I have seen no authority which satisfies me that he could in such a case recover; and I confess that my mind is not sufficiently acute to be able to discover any distinction between a payment under such circumstances and the payment on which the plaintiff now seeks to recover. In that case it is true the default in losing the note would be the sole act of the plaintiff. In this case the *default* which *rendered him liable* was wholly his own in giving up the note. There was no default or misconduct in defendant in receiving a note which he considered, and no doubt still considers, he has paid; and even if it be admitted that the defendant was as much to blame in receiving as the plaintiff was in giving up the note when only paid in part, I cannot perceive that a mistake or error in which both are involved can confer

upon the plaintiff a right to make good to his employers the consequences of his own error, and then to call upon the defendant to make up to him what he has been obliged to pay to exonerate himself with them. This case is not like the case of a public officer, who in the discharge of duties imposed by law, may be compelled to pay money for acts done or omitted to be done at the instance of a party or in consequence of the acts or omissions of such a party. In case of a prisoner escaping from the sheriff through neglect or by the misconduct of the prisoner, the sheriff may recover as upon an implied request to pay any monies which he may have been obliged to pay by reason of such escape; and it is not necessary that a sheriff should defer the payment of his liability till it is enforced by law, to enable him to recover against the individual who has occasioned such liability. The obligation on the sheriff to pay is the legal effect resulting from the act of a party who escapes, and every person who exposes another to such a result must be held responsible for the payment of such monies as may by law be enforced in consequence of such act. When the sheriff has paid money in consequence of an escape, the execution is discharged and cannot afterwards be enforced against the party who has escaped. The money is therefore paid to the use of such party; and as he must be aware of the legal consequences of escaping from custody, the money must be regarded as paid with his assent, and so a promise to repay will be implied. In our own Court of Queen's Bench, in the case of *Sumner v. Kirkpatrick*, a bailiff who paid money to the deputy sheriff for the escape of a prisoner, which the deputy had been obliged to pay to the sheriff, by whom the debt had been paid in the first instance to the plaintiff in the suit, was held entitled to recover from the party who escaped as for money paid to his use. That case came on for trial before me at London, last fall; and the plaintiff was nonsuited on the ground that the money paid by the sheriff originally was that which was paid to the defendant's use in discharging their debt, and that the money paid by plaintiff to the deputy sheriff after the defendant's debt had been satisfied, was paid to relieve the

plaintiff from his own default. The court however set aside the nonsuit, and granted a new trial, on the ground that the plaintiff had been legally exposed to the payment of a sum of money by the act of one of the parties in escaping, and was therefore entitled to recover as for money paid on an implied request. The trial came on again before me last spring, and then the plaintiff proved, what he failed to prove on the former trial, an *express* promise by both the defendants to reimburse him ; and of course under such circumstances he was held entitled to recover. The evidence adduced on the last trial was such as to make the case like that of *White v. Leroux* (Moody & Mal. 347,) in which a sheriff's officer who had paid the debt and costs on an attachment against the sheriff, bail above not having been put in, through the misconduct of the defendant in imposing insufficient bail on the sheriff, was held entitled to recover the amount of the debt paid. In that case the defendant was shewn to have promised the officer, both before and after the payment, to indemnify him. At the trial it was objected on the defence that the whole sum was paid by the sheriff for his own benefit in discharge of an attachment, and that defendant was in no respect liable under that attachment to pay any part of the money. Lord Tenterden, who tried the cause, remarked in reply—"I should have thought so, *but for the promises* of the defendant. The defendant is released from the demand of the debt against him by the payment of the sheriff; although this was not done under process against the defendant, I think, to the extent of the debt it is money paid to his use." The difference between that case and the case of *Sumner v. Kirkpatrick* consists in this, that in that case the payment was immediately from the sheriff's officer to the plaintiff in the suit; and in the latter case it was made to a third party, who had been obliged to pay in consequence of Sumner's default. In the performance of a duty by a sheriff there is to a certain extent a privity between him and the parties to the suit, and each of the parties may hold him responsible for the proper discharge of such duty according to law ; and a party by whose misconduct such proper discharge is pre-

vented must necessarily be held responsible to the amount of any injury resulting from it. But in making a defendant who has escaped liable for money paid in consequence of such escape as for money paid at his request, I cannot but think there is rather a forced construction given to facts to be able to deduce an implied promise from them. However that may be, there is a manifest distinction between the case of a public officer paying under a legal obligation resulting from his duty, and the case of an individual who pays without any such obligation being imposed by law.

There are other cases in which, there being an existing legal obligation to perform particular duties, an implied promise will arise to pay any one by whom such duties are performed. Thus, a married man is bound to maintain and support his wife; a father is bound to support his children; and if they fail to do so, any individual who furnishes to either such necessaries as are suitable to their condition, may recover the amount. So also the duty of burying a dead body is thrown upon an executor, by decency and the interests of society; and being an obligation upon the executor, he is held liable for the expenses incurred, if that duty in his absence is performed for him by another. — 3 Y. & J. 28; 3 Camp. 98; 4 Esp. 41; 20 Law Jl. 135; 4 Eng. Rep. 361. But all these cases, resting upon legal obligations, are, as it appears to me, distinguishable in principle from a case of this nature, in which no obligation was contracted by the plaintiff to pay the defendant's debt.

In some cases, where the goods of a party come into the possession of a stranger, who either makes use of them or disposes of them, the owner may waive the tort and bring his action for goods sold and delivered, or, if converted into money, for money had and received to the plaintiff's use; but it is not necessary, in either of these cases, to allege a request, so as to raise an implied promise to pay, on the part of the defendant. There is indeed a case (*Brown v. Hobson*, 4 Taunt. 189) in which a carrier, who had delivered the goods of A. to B. by mistake, and who, after the discovery of the mistake, paid A. for the goods, was

allowed to recover the value of the goods from B. in an action for money paid at his request. Now, though I admit fully the liability of B. for the value of the goods either to A., the original owner, or to the carrier, who as a bailee had a special property in the goods, which would entitle him to recover against a wrong-doer, I must confess my inability to discover that the carrier paid any money for B. or at B.'s request. No doubt he was responsible to the owner; and when he paid the owner, the goods became his. They could not become B.'s by the carrier's payment of their value to the owner. After such payment, the carrier became entitled to the right of property as well as the right of possession in the goods, and he could have maintained trover against B., who had a bare possession arising from mistake. If the payment could be regarded as made for B. to the owner, and could so be recovered in an action for money paid to his use, then B. might be made responsible for the value of goods which he might be ready at any time to surrender on request. If trover were brought, B. might be able to shew that he was not guilty of any wrongful conversion, under the plea of not guilty; but if the carrier was at liberty to waive the tort and to sue for money paid to the use of B. on an implied request, then the only questions which could arise would be the payment of the money, and the possession of the goods by B. The reason assigned by Lord Denman, C. J., for maintaining the action, certainly seems to me (and I say so with great deference) not sustainable. He says it was money paid by plaintiff to defendant's use, for it was in *discharge of his debt*. If a debt existed, due from B. to A., then the carrier, by the payment of that debt without B.'s concurrence, could acquire no right to recover as for money paid at B.'s request and to his use. By such payment the goods in fact became his own, and he alone was entitled to recover their value in an action of trover, or for goods sold and delivered. As well might a party whose goods have got into the possession of another bring an action for money paid to the use of that other in the original purchase of the goods, as to attempt to recover under circumstances

such as appear in the case of *Brown v. Hobson*. I am aware that these remarks may appear to be at variance with a decision in which I concurred in the Court of Queen's Bench, *Kitson v. Short* (4. U. C. R. 220). In that case the plaintiff, a warehouseman, delivered to defendant a hogshead of sugar belonging to another person, and, being satisfied subsequently that he had done so, he paid the owner the value. The defendant refused to give up the sugar, claiming it as his own; and plaintiff brought his action on the common counts, as for goods sold and delivered, money paid to the use of the defendant at his request, money had and received by defendant to plaintiff's use, and on an account stated. In that case the defendant had sold or used the sugar, and refused to account for it. The objection was taken, at the trial, that the plaintiff could only recover in a special action on the case. The jury, however, gave a verdict for the plaintiff for the amount paid by him to Hall, the owner of the sugar; and the question in term, subsequently, was whether, after a verdict in which it was shewn the defendant had acquiesced by offering to pay the verdict and costs as soon as the amount could be ascertained, that verdict must be set aside and the plaintiff driven to another form of action for that redress which the verdict would give him. The Chief Justice, on that occasion, did state that the rule was discharged, not only because the defendant appeared to have acquiesced in the verdict since the trial, but also because the court considered it was properly rendered under the count for money paid. The learned Chief Justice of this court, then a judge of Q. B., assenting to the discharge of the rule, (as I did also,) said that the only question was whether the defendant was liable in law on the declaration as it stood, or on a special count; that the court at *Nisi Prius* having ruled in favor of the plaintiff, the court might exercise a discretion in setting aside the verdict merely on the objection to the pleadings; and if it was set aside, the plaintiff would have leave to add a special count. Besides which there was express authority in favor of the action on the decla-

ration, and that the defendant appeared by the affidavits to have acquiesced in the verdict since the trial.

I concurred with the other members of the court in discharging the rule, because substantial justice appeared to have been done by the verdict; and I was unwilling to disturb it on merely technical grounds; and there was evidence which would justify the jury in finding for the plaintiff on the count for money had and received to his use. The defendant being a shopkeeper, and having sold the sugar, the proceeds might fairly be regarded as money had and received to the plaintiff's use, so as to entitle him to recover on that count. That case was decided in 1847, and I will not at this distance of time pretend to say that I dissented from the opinion stated by the Chief Justice, as that of the court, that the action was maintainable on the count for money paid. I have a sufficient recollection however of the circumstances, to enable me to say that, had the technical objection been considered as well founded, I should still have been unwilling to disturb the verdict, and thus cause further litigation and costs in a matter in which the plaintiff was clearly entitled to recover, and in which the verdict was in strict accordance with the evidence and the justice of the case.

There the plaintiff had a right of action in some shape. In this case, if any right of action exists, it can only be a special action on the case, setting forth all the facts and alleging a damage arising from the conduct of the defendant; and this objection having been taken at the trial, and the plaintiff nonsuited in consequence, I am still of the opinion, for the reasons which I have endeavoured to state, that the nonsuit was properly ordered.

The case of *Lubbock et al. v. Tribe* (3 M. & W. 607) seems to me in its circumstances more nearly to resemble this case than any of the others to which we have been referred. The plaintiffs were agents in receiving moneys for the shares of a mining company. The defendant had taken stock in the company, and gave the plaintiffs a check on the Bank of England for the amount, and received a

receipt from them as for so much paid on the shares which he had taken. The company subsequently called upon plaintiffs for the amount of their receipt; and then, on reference to the plaintiffs' books, it was found that they contained no entry in reference to the check, or any payment by the defendant. The check was never presented to the Bank of England, and appeared to be lost; and the defendant, on being informed of the loss, sent notice to the bank not to pay the check, and promised plaintiffs to give them another. Being subsequently pressed to renew his check, he said it was not convenient for him then to do so, but that in the course of a short time he would pay the plaintiffs the amount. The plaintiffs being pressed by the mining company, paid the amount, and afterwards brought their action against defendant to recover the money, as so much paid to defendant's use by his request. It was however held that, in paying the money, it was paid in discharge of plaintiffs' own liability, and not to the use of the defendant. There there was a specific promise to pay the plaintiffs; but being made before the plaintiffs had themselves paid the money, it was not binding on the defendant. And though the defendant's stock was in fact paid for by the plaintiffs, and the whole circumstances admitted by defendant, and a promise of a new bill and of subsequent payment made, the court held that the only remedy was an action on the case against the defendant for not fulfilling his promise, and that the circumstances did not shew any debt due from the one to the other. If the defendant in the present case had admitted the deficiency and promised payment to the plaintiffs after the payment by him to the bank, still such a promise could not be declared on as arising from a request alleged to be made before such payment, and the amount could only be recovered as money due on an account stated or in a special action on the case. In speaking of the remedy by a special action on the case, I do not wish to be considered as pronouncing an opinion that such a remedy in this case is open to the plaintiff; because in that case it would be necessary to inquire how far a party who by his own

default has been obliged to pay money to a third party, can be entitled to recover the amount from another who may have been originally liable to pay it—a question which I have not thought it necessary, and which, since the last argument, I have had no time to consider.

Under these circumstances, my opinion is that the rule must be discharged.

RICHARDS, J.—I am of opinion the payment made by the plaintiff to the bank cannot be considered such an unwarrantable interference with the affairs of the defendant as makes it a voluntary payment for his (the defendant's) use, so that it will prevent the plaintiff from recovering the amount back, in this action.

The case of *Brown v. Hobson* (4 Taunt. 189), confirmed by *Brittain v. Lloyd* (14 M. & W. 762), seems to me to lay down principles which would fully warrant us in deciding that an action for money paid to the use of the defendant would lie in this suit, on the facts stated by the plaintiff in his opening at the trial, and on which he was non-suited.

The principle of the case in 4 Taunt. is supported by *Kitson v. Short* (4 U. C. Rep. 220). The case of *Simmons v. Kirkpatrick* (10 U. C. Q. B. Rep. 483) strongly favors the view taken by the plaintiff, and if good law, is conclusive authority for making the rule absolute for setting aside the nonsuit. I am not prepared to say that these cases should be overruled; and therefore concur with the Chief Justice (whose judgment appears to me to have exhausted the law on the subject) that the nonsuit should be set aside without costs.

CORBETT V. SHEPARD *et al.**Declaration—Trove.*

Plea.—That while plaintiff was possessed and before the committing of the grievances in declaration mentioned, to wit, on, &c., defendant and his wife recovered a judgment against plaintiff, and that a writ of *fi. fa.* was issued, directed to the sheriff, and that the sheriff under and by virtue of said writ, levied execution on the goods and chattels in the declaration mentioned, which are the grievances alleged.

Replication.—That before the time when, &c., to wit, &c., plaintiff being lawfully possessed of said goods and chattels, did mortgage the same to one O. D., to secure the payment of a sum of money then justly due and owing from plaintiff to said O. D., and that plaintiff with consent of said O. D., did remain in possession of the goods and chattels, &c., as of his own lawful property, of all which the defendant had due notice, concluding as to the facts stated with a verification, and then new assigns: that plaintiff on the day and year in declaration mentioned, was possessed of *other* the goods and chattels in declaration mentioned, not contained in or answered by the plea, and which said goods and chattels were other and different than the goods and chattels which were seized and levied in execution, and that defendant B., with the other defendants, converted and disposed of the said *other* goods, &c., in declaration mentioned, and herein newly assigned.

On demurrer to the replication and new assignment.

Held bad for duplicity, as together containing a double answer to the plea, and because the new assignment does not state what particular goods were covered by the plea, and what not so covered.

TROVER for goods, of which plaintiff in his declaration states that he was lawfully possessed as of his own property.

The three first named defendants jointly, and the other defendant for himself, plead not guilty, and plaintiff not possessed; and the defendant Baskerville for himself, hath pleaded specially, that while plaintiff was lawfully possessed of the goods and chattels in the declaration mentioned, *as of his own property*, and before the committing of the grievances in the declaration mentioned, to wit, on the 16th December, 1852, he, the said John Baskerville and his wife, Ann Baskerville, obtained a judgment in the Court of Common Pleas against the plaintiff, for the sum of £47 1s. 4d. for their damages sustained, as well on occasion of the not performing certain promises, then lately made by the said plaintiff to the said John Baskerville and Ann Baskerville, his wife, as for their costs and charges, &c.; that the said John Baskerville afterwards and while the plaintiff was possessed of the said goods and chattels as of his own property, and before the committing of the grievances, to wit, on the 16th December, for obtaining satisfaction of the said damages, sued out of the said Court,

a certain writ of *feri facias*, directed to the sheriff of the United Counties of York, Ontario and Peel, whereby the sheriff was commanded to levy £47 1s. 4d., so recovered against the said plaintiff, and to have the money before the Court of Toronto, on the first day of Hilary Term then next, which said writ before the delivery thereof to the sheriff, was endorsed to levy the said damages, together with 17s. 6d. for the said writ, and also his own fees, poundage and all incidental expenses, which said writ so endorsed, was delivered before the return thereof to the sheriff of the said United Counties, to be executed ; by virtue of which said writ, and for the purpose of satisfying the said money so directed to be made by the endorsement thereon, he, the said sheriff, afterwards and before the return of the said writ, to wit, on the 1st day of January, in the declaration mentioned, and within the said united counties *executed, and levied execution* under and by virtue of the said writ, against the said goods and chattels in the said declaration mentioned, for the purpose of levying thereon, and that he did levy thereon the said monies by the said writ, and the endorsement thereon directed to be levied ; and thereby committed the said supposed grievance in the said declaration mentioned, which are the alleged grievances in the declaration mentioned : and this he is ready to verify.

Issues were taken on the pleas of not guilty and not possessed, and to the special plea of Baskerville ; plaintiff replied : that before the said time, when, &c., to wit, on the 9th December, 1852, he, the plaintiff, being then lawfully possessed as of his own property of the goods and chattels in the plea mentioned, and being a resident in the county of York, by a certain *deed poll*, by way of mortgage, made by plaintiff, he the plaintiff, did in consideration of the sum of £186 8s. 10d. paid to him by one John O'Donahoe, *bargain, sell, alien, release, grant, and confirm* to the said John O'Donahoe, the goods and chattels in the said plea mentioned for ever ; subject however to a proviso, or condition, that, the said deed should be void if the plaintiff paid to the said John O'Donahoe the sum of money within one

year from the date last aforesaid, with interest at the rate of £6 per centum per annum, *otherwise* the same should remain in full force and effect. The replication then sets out the name of the witness to such deed poll, and that the deed together with an affidavit of the due execution thereof, was on the 9th December, before the recovery of the said judgment in the plea mentioned, duly filed in the office of the clerk of the County Court, according to the statute in that behalf, and also an affidavit of the said John O'Donahoe, duly sworn before a commissioner, that the plaintiff was then justly and truly indebted to the said John O'Donahoe in the sum before mentioned; that the said deed was executed in good faith, and for the express purpose of securing payment of the said money so justly due, and not for the purpose of protecting the goods and chattels in the plea mentioned against the creditors of the plaintiff. The replication further alleges that after the making of the said deed, up to the time when, &c., he the plaintiff, remained in possession of the said goods and chattels in the plea mentioned, *by and with the consent of the said John O'Donahoe, as of his own lawful property* as aforesaid; that the said sum of money in the deed mentioned, at the time when, &c., remained unpaid by plaintiff to O'Donahoe; and that the taking and levying in the said plea, and the said conversion in the declaration mentioned, took place nine months before the expiration of the year within which plaintiff had to pay the said O'Donahoe, and that plaintiff by means of the premises in this replication mentioned, *and of the possession and right of possession* as aforesaid, of the goods and chattels in the said plea mentioned, and *in no other manner*, was at the time of the said levying and taking and conversion, possessed of the said goods and chattels in the plea mentioned, in manner and form as he has in his declaration alleged; of *all which* the said *John Baskerville*, before and at the time he levied and took in execution the said goods and chattels, as in his plea alleged, had full notice,—concluding, as to the facts stated, with a verification. The replication then further proceeds thus: “And the plaintiff further says to the said last plea of the

said John Baskerville, that he sued out his writ, and declared in this action, not only for the committing of the said grievances in the said plea mentioned, but also for that the plaintiff, to wit, on the said day in the declaration mentioned, in that behalf was lawfully possessed of other the goods and chattels in the declaration mentioned, not contained in or answered by the said plea, and which said goods and chattels *were other and different than the goods and chattels which were seized and levied in execution, and from which the monies in the same plea were levied thereout*, under the writ in the said plea mentioned; and for that the defendant John Baskerville, together with the said other defendants, *as in the declaration mentioned*, afterwards, to wit, on the same day in the declaration mentioned, *converted and disposed* of the said *other goods and chattels* in the said declaration mentioned, and *herein newly assigned* in manner and form as the plaintiff has in his said declaration alleged, and this he is ready to verify.

To this replication the defendant Baskerville demurred, specially assigning for causes—that plaintiff by his replication alleges that plaintiff prior to the taking and seizing of the said goods and chattels, in manner and for the purpose in the plea of the said John Baskerville justified, had parted with all his (plaintiff's) possession and right of possession in and to the goods and chattels, the taking of which is in and by the said last plea justified. That it is not alleged positively, but only argumentatively in the replication, that the deed poll by way of mortgage in the replication mentioned was executed *bona fide*, or the same was executed prior to the recovery of the judgment in the plea of Baskerville set forth, or prior to the delivery to the sheriff of the writ of execution which issued upon the said judgment as in the plea mentioned. That the replication does not allege anything in law sufficient to protect the goods and chattels in the said last plea of Baskerville mentioned from liability to satisfy the judgment set forth in the plea.

That it is not alleged in the replication that the deed poll by way of mortgage contained any covenant or proviso

to the effect that, until default should be made in the payment to the said John O'Donahoe of the sum of money in the replication mentioned, the plaintiff should retain possession of the goods ; and that plaintiff by his replication alleges a possession of the goods in the plea of Baskerville mentioned, after the alleged grant and assignment to John O'Donahoe, by virtue of an alleged parol consent of John O'Donahoe inconsistent with the alleged grant and assignment of the goods to O'Donahoe ; also, that the alleged possession by plaintiff of the goods as in the replication mentioned was upon the face of the replication a possession sufficient to make the goods and chattels liable to satisfy the execution.

That the replication and new assignment are double—in this, that plaintiff by his replication asserts a right to recover damages against Baskerville alone, in respect of the taking and seizure of the goods and chattels, the taking of which by the plea of the said John Baskerville is justified upon matter in the said replication, pleaded by way of bar to such justification, and by the new assignment the plaintiff seeks to recover damages against John Baskerville and the other defendants, for an alleged taking by them jointly of goods and chattels in the new assignment alleged to be other and different from the goods and chattels in the last plea of Baskerville mentioned, the taking of which is therein justified at another and different time from the time in the plea of Baskerville mentioned. That plaintiff in and by the new assignment alleges that he sued out his writ, and declared in this action not only for an alleged taking and conversion by John Baskerville alone of the goods and chattels in Baskervilles' last plea mentioned, the taking of which is by that plea justified, and also for another alleged taking and conversion by Baskerville and the other defendants jointly, of other goods and chattels of the plaintiff at another and different time.

On the argument, *Gwynne*, Q. C., for the demurrer, contended, as to the special grounds assigned—that the declaration consisted of one count in trover, and alleged a joint conversion ; wherefore the plaintiff can only recover

against all jointly ; and if he fails to shew a joint right of action against all, he must fail in toto.

That as to the defendant Baskerville, he new assigned going for other goods, though the plea covers all the goods specified in the declaration ; that it is not like a general count for goods sold and delivered, but a form of action in which the goods are, and unnecessarily are, specified, some singly, some in plural numbers.—*Bracegirdle v. Peacock*, 8 Q. B. 187.

That the declaration and new assignment should agree in time and things ; but here the new assignment is for *other* things, and inconsistent, and expands the declaration as against Baskerville alone, without including the other defendants.

That the new assignment was bad, and the replication bad in itself.

That the plea is good or bad ; if good, well—if bad, it is answered, and badly answered.

That the matter replied is no answer.

That the plaintiff cannot set up the mortgage—being for the sole benefit of the mortgagee, and not of the mortgagor—*Stat. 12 Vic. c. 73*.

That, as mortgagor in possession, it is no answer to his execution creditor, and to support trover he must have both property and right of possession—*Gordon v. Harper*, 7 T. R. 9.

That his interest as mortgagor might be sold in execution by the provincial statutes, especially if entitled to retain possession by the terms of the mortgage, as may be inferred when the mortgage is registered under the act though silent on the face of it—*Brierly v. Kendall*, 16 Ju. 449 ; *White v. Morris*, 16 Ju. 500.

If the mortgagee is to be regarded as a trustee, still he is the proper party to sue—*Finn v. Bittlestone*, 7 Ex. R. 152 ; *Bradley v. Copley*, 1 C. B. 672, 685 ; *Ward v. Macaulay*, 4 T. R. 489 ; *Gordon v. Harper*, 7 T. R. 9 ; *Manders v. Williams*, 4 Ex. R. 343.

Wilson, Q. C., for plaintiff, contended that the sheriff could not seize and sell the mere equity of a mortgagor in

goods mortgaged ; and if not, that he is a wrong-doer, and the bailee may maintain trover against him. Goods held under a lien or pawned, not seizable or saleable under a *fi. fa.*—Legg v. Evans, 6 M. & W. 36 ; Scott v. Scholey, 8 East, 467.

That the defendant, though a judgment and execution creditor, was a wrong-doer *quoad* these goods, owing to the qualified interest of the plaintiff therein. Batcheler v. Vyr, 4 M. & Scott 562 ;—that for selling in excess the sheriff is liable in trover, and so the defendant—Aldred v. Constable, 4 Q. B. 674, 1 S. C. 6, Q. B. 370 ; as to special pleas in trover.

That the plaintiff new assigns that defendant did not seize all the goods under the *fi. fa.* and uncertainty is not alleged as a ground of demurrer.

That trover lies on the possession alleged—Legg v. Evans, 6 M. & W. 36.

That trover lies on the pleadings stated—Rogers v. Kenney, 9 Q. B. 592.

As to damages, see Finch v. Blount, 7 C. & P. 478 ; Brierly v. Kendall, 10 Eng. R. 319, S. C. 16 Ju. 449.

Gwynne, in reply, said all the cases cited were against sheriffs and not applicable.

That the defendant was only a converter constructively—that is, through the execution and the sheriff's agency, and is vindicated.

That the new assignment is misplaced—the declaration only complaining of one time and one act ; and the new assignment alleges another time and another act.

That it admits the declaration well answered, *prima facie* ; and yet new assigns against one defendant only at another time, &c.

Aldred v. Constable, 6 Q. B. 370, gives the correct form of replication—and see Bolton v. Sherman, 2 M. & W. 396 that the sheriff could only be liable in trover for the excess which shews the act separate ; and the plaintiff cannot split the alleged conversion stated in the declaration into two—firstly, for goods sold as under the process ; and, secondly, then for an excess beyond it.

That the goods were seizable ; that plaintiff had no lien or right of possession as against defendant ; no injury is shewn, and the defendant not a wrong-doer.

See *Owen v. Knight*, 4 N. S. 54, 8 Ju. 577, 12 Ju. 580, *Bingham v. Clements*, 12 Q. B. 265 ; *Monaghan v. Hayes*, 4 U. C. C. P. R. 1 ; *Howarth v. Tollemache*, 4 M. & G. 427 ; *Pickard v. Sears*, 6 A. & E. 469 ; *White v. Teal*, 12 A. & E. 106 ; *Freeman v. Cooke*, 2 Ex. R. 654, S. C. 6 D. & L. 187 ; *Bradley v. Copley*, 1 C. B. 685 ; *Legg v. Evans*, 6 M. & W. 36 ; *Hewett v. Maguire*, 7 Ex. R. 80 ; *Finn v. Bittlestone*, 7 Ex. R. 152 ; *Gugg v. Wills*, 10 A. & E. 90 ; *Wheeler v. Montefiore*, 2 Q. B. 133.

MACAULAY, C. J.—It is not raised as an objection to this plea that it amounts to the plea of not possessed. The question whether the special matters pleaded can be given in evidence under the plea of not possessed will be considered upon the rule nisi for a new trial, pending in this case.

Assuming this plea to be good, several questions are raised upon the demurrer to the replication and new assignment.

1st. As to the replication : It is objected that the plaintiff having parted with his property and right of possession, is out of court by his own shewing, and cannot maintain trover upon the facts stated in such replication.

The nature of this action is discussed and stated in *Cooper v. Chitty* (1 Bur. 20 to 37) ; the judgment of Lord Mansfield, commencing at page 33 ; *Gordon v. Harper* (7 T. R. 9), 3 Sal. 365-6 and notes, *Bradley v. Copley* (1 C. B. 685), *White v. Teal* (12 A. & E. 108-9).

Legg v. Evans (6 M. & W. 41), where in trover a plea justifying under a *fi. fa.* against plaintiff's goods, the plaintiff replied a lien, which on special demurrer was objected to be a departure. Parke, B., said it is not a departure ; any person having a right to the possession of goods may bring trover in respect of the conversion of them and alleged them to be his property. It was in that case held that goods held by an execution debtor in right of a lien cannot be

taken in execution.—3 Bul. 17; White v. Teal (12 A. & E 601), Rogers v. Kenney (9 Q. B. 592-3); Richards v. Symons (8 Q. B. 90).

The above and following authorities shew, that while on the one hand actual possession and right of possession as against the defendant, is a sufficient title to maintain trover *prima facie*; on the other hand, goods belonging to another in the possession of a debtor by the owner's consent, cannot be taken in execution under a *fi. fa.* at the suit of a creditor.—Byrne v. Plane (1 Lev. 210-1), S. C. Cro. El. 218, Vandrenk v. Archer (1 Lev. 221), Isaac v. Belcher (5 M. & W. 139). In Fyson v. Chambers (9 M. & W. 461), Parke, B., said that it was not a case of simple possession but of possession connected with a kind of bailment, the intestate is in possession by consent of the assignees; and *ib.* 466, 467, 469, and note; Howarth v. Tollemache (4 M. & G. 427), Brierly v. Kendall (16 Ju. 449, 10 Eng. R. 319).

Now here, although the replication states an absolute assignment of the goods to O'Donahoe defeasible on payment of a certain sum at a future day, still it alleges that the plaintiff was previously possessed as of his own property, and remained in possession thereof by and with the consent of the said O'Donahoe *as of his own lawful property as aforesaid*.

It is not shewn by the terms of the assignment that he was *entitled to retain possession*, and the nature of the possession alleged may import an oral trust with which the possession was consistent, as to which see White v. Morris (16 Ju. 500, 11 Eng. R. 515).

Still I think it clear that they were not liable to be seized and sold in execution at the suit of defendant under a *fi. fa.* against the plaintiff's goods, and that the defendant shewing no other right to take them out of the plaintiff's possession and convert them, is liable in this action. The replication displaces the ground on which the justification rests. The amount of damages which the plaintiff may be entitled to recover is a separate and distinct question.—

See also *Bradley v. Copley* (1 C. B. 685), *Wheeler v. Montefiore* (2 Q. B. 133).

The possession retained was inconsistent with the deed, in contemplation of law; but being obviously only transferred to secure a debt, and by way of mortgage, it is not like a case of absolute assignment not defeasible on the face of it, and by the provincial statute 12 Vic. c. 74 is the mode adopted for giving notice to creditors of the existence of such incumbrances.—See also 13 & 14 Vic. c. 62. This disposes of the 1st, 3rd, 4th, and 5th grounds of demurrer.

It is very true, as I remarked in the case of *Monaghan v. Hayes*, decided this term, that in the case of *Elliott v. Kemp* (7 M. & W. 312), and *Fyson v. Chambers* (9 M. & W. 466-7), Baron Parke expressed doubts whether trover could be maintained upon a mere naked possession; and the cases of *Holman v. Karwithy* (2 Bul. 315), and *Sutton v. Moody* (1 Lord Raymond 251), may be also referred to as supporting the doctrine that if the whole property arises from possession trover will not lie.—Also *Selwyn*, N. P. 1003; *Parker*, 112; *Turner v. Ford* (15 M. & W. 212), *McC. & Y.* 118; 12 Price, 385-6.

Still I find it laid down repeatedly in the books that wherever there has been a tort to goods followed by a conversion for which trespass would lie, trover is also maintainable, although there are instances of trespass not attended or followed by a conversion, in which trover would not lie. But these cases do not depend upon the insufficiency of the title as derived from mere possession, but of the proof to establish a conversion in addition to the mere act of trespass.—See *Foulds v. Willoughby* (8 M. & W. 540), *Fyson v. Chambers*, *supra*; *Bishop v. Montague* (Cro. El. 824), *Bushnell v. Miller* (1 Strange 128), *Bingham v. Clements* (12 Q. B. 260).

The case before us is that of a mortgagor in possession of the goods mortgaged by bill of sale, determinable on the face of it on payment of a sum of money at a future day, with the assent of the mortgagee. It is therefore, as said by Parke, B., in *Fyson v. Chambers*, not a case of

simple possession, but of possession coupled with a kind of bailment, a kind of special property against all but the assignees ; or, to apply it here, the mortgagee.

The plaintiff had not merely a nude possession, but a possession with the assent of the mortgagee or legal owner, coupled with an interest by which upon payment of a specified sum of money within a specified time (not yet arrived) he could re-invest the title in himself as it had been previously.

To this possession there may be a trespass followed by an actual conversion ; for if the execution in the defendant's favor did not authorize him to seize and sell goods circumstanced as these were, he was *quoad* these goods a stranger, a wrong-doer, a *tort-feasor*, and a trespasser ; and if so, it appears to me to amount to one of those cases in which, though trespass would lie, trover is also maintainable.

I do not think it can be laid down as a rule of law that a mortgagor of goods before default, or any other bailee in possession of goods at will, sufferance, or during pleasure, cannot maintain trover against a stranger, and who wrongfully (and without any privity or title derived from the mortgagee or owner) takes them out of such possession wrongfully, and converts them to his own use, or that the only remedy is by trespass for seizing the goods, with damages in the discretion of the jury, regardless of the value of the goods themselves.

As to the second ground of special demurrer, it is said to have been removed by amendment ; as it appears in the demurrer book, the replication alleges the making of the deed of assignment, and that it was filed according to the statute, *before* the recovery of the judgment mentioned in the plea, and that the deed was executed in good faith.

It does therefore only argumentatively allege that the mortgage was executed prior to the recovery of the judgment ; and it does not (otherwise than by the allegation of the time, under a *videlicet*) allege that such assignment preceded the delivery of the writ of *fi. fa.* to the sheriff, from which time the goods would be bound ; although it is argumentatively alleged by the allegation, that the assignment

was filed before the judgment was recovered, and which must be presumed to have preceded the issue of the execution. The latter, however, is not made a ground of demurrer. It is immaterial whether the mortgage was made before or after the recovery of the judgment, and that seems an answer to the objection taken. What is material is, whether it preceded the delivery of the writ to the sheriff. This is not made a ground of the demurrer, and it is substantially averred that it had privity, and the days alleged by way of time are consistent with such a fact.

On the whole, therefore, I see no reason for holding the replication bad, taken by itself. It may be a question whether, if the new assignment only is faulty, it will affect the replication also, as together constituting an answer to the plea, and therefore bad in toto if bad in part.

The first question however is, whether the new assignment is good in law on these points. I would refer to *Duffield v. Scott* (3 T. R. 376), *Freeman v. Hunt* (1 T. R. 40), 1 Sand. 28 (e), *Vivian v. Jenkin* (3 A. & E. 741), *Monkman v. Shepardson* (11 A. & E. 411, 15 Q. B. 289), *Aldred v. Constable* (4 Q. B. 674, S. C. 6 Q. B. 370), *Page v. Hatchell* (8 Q. B. 189), *Hawthorn v. the Northern Railway Company* (3 Q. B. 739).

As to those goods in relation to which the declaration is uncertain as to numbers or quantity, the case of *Page v. Hatchell* (8 Q. B. 187) is an express authority in favor of the new assignment; and see *Bracegirdle v. Peacock* (8 Q. B. 174), *Bowen v. Jenkin* (6 A. & E. 911), *Loweth v. Smith* (12 M. & W. 582), *North v. Jerrington* (13 M. & W. 781), *Gunn v. Jones* (1 Saund. 299, 300), *Bolton v. Sherwood* (2 M. & W. 395). But the case of *Polkinghom v. Wright* seems to shew that duplicity may be objected to on demurrer to both the replication and new assignment, if the plea covers the whole declaration and the replication answers the plea. See *Lucas v. Nackells* (10 Bing. 157), *Dand v. Kingscote* (6 M. & W. 174), *Ashton v. Brevitt* (14 M. & W. 106), *Robertson v. Gantlett* (16 M. & W. 289, 1 Sand. 300, 19 L. J. Q. B. 269).

Then the declaration being for the conversion, on the

first of January, &c., of one plough, one harrow, &c., and the plea justifying the seizing and converting the same, the new assignment is framed to extend the declaration to one other plough, one other harrow, &c., and so is open to the objection of departure, or the whole replication to the objection of duplicity, as having in the first place answered the plea, maintaining the action as to the plough, harrow, &c., covered thereby, and then new assigning another plough, harrow, &c., afterwards converted, and thus stating in effect either two conversions of the same plough, harrow, &c., or the conversion at the same time, or at a different time, of another plough, harrow, &c., and is bad in either light.

Another objection to the new assignment is, that it does not distinguish and mention what specific goods mentioned in the declaration and ostensibly covered by the plea were not so.

It is left quite uncertain what goods the plaintiff means to admit the plea covers, and what he means to new assign, as not embraced by such plea.

The new assignment says the plaintiff was possessed of *other the* goods in the declaration mentioned not contained in or answered by the plea, and which said other goods were other and different than the goods in the plea mentioned, which were levied in execution, &c., without stating which were covered by the plea and which not.

The only room for question is, whether the replication and new assignment are both bad ; for that the new assignment is so appears to me clear, especially in relation to the single articles of goods alleged in the declaration to have been converted, and no others can be imported into the declaration through the medium of a new assignment.

Then, as respects duplicity, it is in effect a double answer to the same articles of goods. 1st, admitting their seizure and conversion under the *fi. fa.*, and answering the plea justifying the same ; and 2ndly, alleging them to have been other articles, though only one of each is specified in the declaration.

I am not quite satisfied the objection ought not equally

to apply to those articles of which a plurality are stated in the declaration; for the declaration, being required to specify and enumerate the goods for which the action is brought, had the introductory part of the plea mentioned all the goods as therein stated, instead of referring to the declaration generally as it does, it would have professed to justify the conversion of one plough, &c., 20 bushels of apples, &c., 500 bushels of wheat, &c., 4 cows, &c.

But the case of *Polkinghom v. Wright*, and others therein referred to, seem to determine that the number and quantities being laid under a *videlicet*, and the plaintiff not being bound thereby, the plea may be also general, unless restricted in itself, and that a new assignment may be engrafted upon a traverse or other replication answering the matter of the plea.

This, however, cannot be equally said of single articles of goods, because the plaintiff could not recover for any such cause of action without proving the conversion of an article answering the description; and plea and declaration agreeing in point of identity, and the replication answering the plea in other respects, the identity cannot be identity put in issue by a new assignment.—*Hawthorn v. Newcastle Railway Co.* (3 A. & E. 739), *Aldred v. Constable* (6 Q. B. 370, S. C. 4 Q. B. 674, *supra*.)

Then, is it a double answer or only repugnant, and a departure, and separable from the replication, so as to leave it untouched by the demurrer?

In *Page v. Hatchett* (8 Q. B. 187), duplicity was assigned as a cause of demurrer; and although the court decided against the demurrer, it does not seem to have been contended that, if the new assignment had been held bad, it would not have vitiated the whole replication. And in the next case, *Polkinghom v. Wright* (8 Q. B. 197), the objection of duplicity, in a case bearing close analogy to the present, was valid.—*Butt v. Great Western Railway Co.* (20 L. J. C.P. 201, 7 Eng. R. 443), *Weeding v. Aldrich* (9 A. & E. 861), *Row v. Ames* (6 M. & W. 747).

Upon the whole, I am disposed to think the objection of duplicity well founded, inasmuch as the replication and

new assignment together contain a double answer to the plea; the first containing special matter displacing the justification of the conversion of the goods necessarily covered by the plea, and then superadding the charge of another conversion of similar goods, as if different; the allegation being, that the plaintiff declared not only for the committing the grievances in the declaration mentioned, but also that plaintiff was possessed of *other the goods* in the declaration mentioned, not covered by the plea, as if different, where only one single article of various different kinds of goods is mentioned in the declaration, and cannot therefore be at one and the same time the same and different.—11 A. & E. 412, Tyr. Plg. 688.

As to the argument that the new assignment attempts to isolate the defendant Baskerville, and charge him with what the other defendants are not charged with, I do not feel the weight of it; for if the new assignment was good, it would be merely an explanation of the declaration, and the other defendants, with defendant Baskerville, charged with all the declaration contains.

Much of the argument on this head, and as to the defendants not being liable for excess in the sale by the sheriff; is answered by observing that no such excess appears or is alleged: that a direct and not a constructive conversion is charged, and that it is matter of evidence and does not arise on this demurrer.

McLEAN, J.—By the replication the plaintiff shews that he had, before the seizure of the goods, made an assignment of them, absolute in its terms but defeasible by payment of a certain sum of money and interest, at a particular day; and he also shews that he had in fact no right to the possession of the goods, and that all the interest which he had in them was a bare possession by the parol consent of the assignee. There was nothing in the deed of assignment to entitle plaintiff to retain the goods till default in payment of the money, and had O'Donahoe chosen he could at any time have taken the goods out of plaintiff's possession and kept them; and whether plaintiff should afterwards become the

owner of the goods must have depended upon his paying the money (£186 8s. 10d., and interest) on the day mentioned in the assignment. The property in the goods and the right of possession are, by the replication, I think, clearly shewn to be in O'Donahoe at the time of the seizure, and no present *right of possession* in the plaintiff. He merely had the goods by self-sufferance, without any present interest or property in them. In a case of trover decided during the present term, "*Monaghan v. Hayes*," I gave it as my opinion that the defendant's plea was bad, and amongst other reasons, because in attempting to give color, all the title allowed to the plaintiff was a bare possession, without any right, and that such naked possession was insufficient to sustain trover.

In the case of *Bradley v. Copley* (1 C. B. 697), Tindal, C. J., says, "ever since the case of *Gordon v. Harper* (7 T. R. 9), I take the rule to have been, that to entitle a party to maintain trover he must have the *right* of possession in the goods sought to be recovered. Maule, J., says, "the question for the opinion of the court is whether the plaintiff was lawfully possessed of the goods. That, I apprehend, means *so entitled* to the immediate possession as to enable them to maintain this form of action." In that case the action was against the sheriff for seizing goods, which plaintiffs were entitled to take possession of, in default of payment of a sum of money on demand. No demand had been made of the money, and the party against whom the execution was had a right to retain the goods until demand and default.

There the action was by the assignees of the goods, who were not in possession, and who had only a contingent right of possession. Had this suit been brought by O'Donahoe as plaintiff, he could have established his right to the property and to the possession, and the possession of plaintiff by mere sufferance must have been regarded as in fact the possession of O'Donahoe.

In the case of *Fenn v. Bittleston* (8 Eng. Ex. Rep. 486), Parke, B., says, "If the goods had been simply taken by a third person out of the custody of Malpas (the party who had mortgaged them and held them by the terms of the deed

titles default), no action of trover could have been maintained, because the plaintiffs would have no present right to the possession. A present *right* of possession I hold to be essential to maintain trover against a party who is not a wrong-doer." Here the defendant, in depriving plaintiff of the possession of goods, under an execution against him, cannot, as to him, be considered a wrong-doer. If the plaintiff, by the terms of the instrument to O'Donahoe, was entitled to hold the mortgage goods until default made in the payment of the money, his interest in the goods could be seized and sold, and any purchaser would immediately have a right to pay up the incumbrance, and to retain the goods to his own use. The plaintiff, surely, cannot be in a better position from the want of any ostensible authority to hold the goods than if he held them by the express written sanction of the mortgagee.

RICHARDS, J., concurred.

THOMAS CORBETT V. ISRAEL SHEPARD, THOMAS SHEPARD,
JOSEPH SHEPARD, AND JOHN BASKERVILLE.

Proof of a judgment and execution under which defendant justifies is admissible under the pleas of not guilty and not possessed.

Writ issued 21st March 1853—Declaration, 14th April 1853.

1st. count.—Trover for certain enumerated goods and chattels; the conversion laid the 1st January 1853.

The three first named defendants, Shepards, plead jointly,
1st—Not guilty.

2nd—Plaintiff not possessed as of his own property, *modo et forma* alleged, and issues.

The fourth defendant (Baskerville) pleaded separately,—
1st—Not guilty.

2nd—Plaintiff not possessed, and issues.

3rd—A special plea of justification, to which there was a replication and new assignment, demurred to by the said defendant; the demurrer was argued last term; *venire* to try the issues and assess contingent damages.

It appeared in evidence that by deed poll, dated the 9th December, 1852, the plaintiff, in consideration of £186 8s. 10d., to him paid by John O'Donahoe, bargained, sold, released, granted and confirmed to the said O'Donahoe, all the goods &c. mentioned in the schedule thereto annexed, then being on Lot No. 17, 6th concession West Gwillimbury, to hold &c. forever, with warranty of title and a proviso for making void the same upon payment by plaintiff to the said O'Donahoe of the sum of £186 8s. 10d., within one year from date, with interest at 6 per cent: the execution was proved and the affidavit of the mortgagee required by the statute was made, and the mortgage was filed the same day; the schedule mentions farming stock and produce, and household furniture &c., with a value attached to each and extended in a column of £. s. d., the whole being £186 8s. 10d.

Nothing is therein said respecting possession in the meantime, but it appeared that the plaintiff continued in possession.

That by warrant under the hand and seal of William B. Jarvis, Esquire, sheriff of the County of York, &c., bearing date the 18th December 1852, and directed to John Armstrong and two others, his bailiffs, he directed them as by a writ of *fieri facias*, dated the 27th November 1852, commanded him, &c., to cause to be made of plaintiff's goods £47 1s. 4d., which John Baskerville and wife had recovered against him in the Court of Common Pleas, in an action of assumpsit &c., on the back of which warrant was endorsed "ask Mr. Shepard."

That on the 24th December 1852, John McGuire, one of the bailiffs to whom this warrant was addressed, was on his way to the plaintiff's place of residence to execute such warrant; that before reaching the plaintiff's he met the plaintiff and wife on their way to Toronto, with a waggon and pair of horses; that the bailiff apprised the plaintiff of his object, upon which the plaintiff declared he had no property, that all belonged to O'Donahoe, who would make him smart for it if he touched it; that he made a levy on the horses and waggon, but suffered them to proceed at the

pressing solicitation of plaintiff's wife, who also said her brother, O'Donahoe, owned all; that plaintiff refused to do anything, and the bailiff proceeded in the first place to the defendant, Israel Shepard, (who is the father of the other two defendants of the same name), and saw him on the same day at his own house and told him what plaintiff had said, that is, that he had no property, upon which said Shepard said he could find plenty and went with the bailiff to the plaintiff's residence in North Gwillimbury, (seven or eight miles beyond the place where he had met the plaintiff), and shewed the property and told him to seize everything on the place, whereupon the bailiff made a seizure of the goods now in question, and all of which were included in the bill of sale to O'Donahoe; that said Shepard then told the bailiff he would look to the sheriff if he did not do his duty, and from what he said the bailiff felt that he must remove the property, leave some one in possession, or obtain security; that he left a man in possession, and then went to Joseph Shepard (the third defendant), about expenses; that he saw him and the defendant Thomas Shepard at a village called Sutton, and that the defendant Israel was also in the village.

That on the same day (24th Dec., 1852), but after the seizure above mentioned, the defendants Joseph and Thomas Shepard signed a paper of that date, and Thomas signed his father's name thereto also, and the bailiff gave evidence sufficient to show that the defendant Israel, soon afterwards and on the same day, approved of it, saying he would see him secured, and sign any bond of indemnity and to any extent he wanted, but would look to the sheriff for the safe keeping of the goods.

The paper stated that Israel and Joseph Shepard did thereby request the sheriff to remove the property supposed to belong to the plaintiff, then in his possession in North Gwillimbury, which the sheriff had seized at the suit of John Baskerville and wife, and in case the said property was not sold, or of any person claiming the same, they agreed to pay any costs or charges or expenses which the sheriff might or would be put to for removing said property,

by virtue of the writ to him directed out of the Court of Common Pleas at Toronto.

That the bailiff left one Doan in possession of the goods, many articles of which are enumerated on the back of the warrant, in the blank space of a printed receipt for goods seized, endorsed thereon, which said receipt was not, however, signed by any one.

Then, on the following Monday, the bailiff removed a number of the things to Newmarket, twenty miles distant, as likely to afford a better market; that the teams of the defendant Israel Shepard and of the defendant Baskerville assisted in such removal, being hired by the bailiff for that purpose, to save expenses, as he said.

That the defendant Israel Shepard and defendant Baskerville, brought the bailiff a copy of the bill of sale, and spoke as if he was, of course, to sell in the first place to a sufficient amount to satisfy O'Donahoe's claim and then the warrant.

That a sale was advertised for the 4th January, at Newmarket, but afterwards postponed till the 7th, in consequence of a letter from the sheriff.

That on the 7th January a *bond of indemnity*, under seal and bearing that date, was executed *by all the defendants* to the sheriff, in the penal sum of £550. It recited a writ of *fi. fa.*, &c., and that disputes had arisen touching the sheriff's right to sell the goods seized, and was conditioned for his full indemnity for seizing and selling the goods therein referred to, and "being retrospective so far as any seizure, levy or costs, under the said execution, that may already have taken place on the payment toward Baskerville and wife, of the said execution monies, &c., made by the sale of the said goods," (see the condition, which was comprehensive in its language.)

That on the same day (17th January, 1853), the goods, or a large portion of them, were sold by public sale at Newmarket; that the defendants were all present, unless Israel was absent.

Things were sold to the amount of £195, and others not included therein; that O'Donahoe was at the sale, and that

one O'Brien, on his behalf, had forbidden it; the plaintiff was there also, but did not forbid anything, it was considered as forbid by O'Donahoe, for both himself and plaintiff; of the things sold a number seemed to have been taken back to the plaintiff's, as if bought in for him; the sale was said to have been a good one as to prices.

The defendants offered to prove a judgment and *fi. fa.*, at the suit of the defendant Baskerville, and his wife, against the plaintiff, and a *fi. fa.* against his goods, which were rejected as inadmissible under any of the pleas in issue.

They then proved the bill of sale to O'Donahoe, above mentioned, and that of the proceeds of the sale £187 12s. 1d. had been paid to O'Donahoe, through his attorney, and who is the plaintiff's attorney in this action, and that the balance, after deducting sheriff's fees, was paid to the Baskervilles' attorney; thus the gross amount of sales was £243 18s.

Paid to O'Donahoe, £187 12 1

Do sheriff's fees, - 20 1 11

Do Baskerville, - - 36 4 0

—————£243 18s. 0d.

The plaintiff's counsel objected to the bill of sale as inadmissible, but it was received in mitigation of damages.

The defendant's counsel objected,

1st. That if the original seizure constitutes the conversion no defendant is implicated except Israel Shepard.

2nd. If the *rule* is relied upon then the plaintiff was not at that time in possession, had no legal right to the possession by reason of the bill of sale to O'Donahoe, and had denied the property being his.

3rd. That the bond admits an execution, and trover will not lie against the defendants merely as having signed it.

4th. That the evidence will not sustain trover.

5th. That the plaintiff's attempt at repudiation repress any influence of property or right of possession, by reason of the possession he had.

6th. That for excess in the levy or sale the defendants, who only undertook to indemnify him for executing a writ, are not liable in trespass, the remedy for excess being *case*—*Finch v. Blount*, 7 C. & P. 478.

These objections were overruled at the time, and it was left to the jury to find for the plaintiff under the evidence, the difficulty consisting rather in the amount of damages; and the jury were told that as O'Donahoe, in law, owned the goods, plaintiff being only a mortgagor in possession, and O'Donahoe having adopted the sale by receiving the proceeds to the extent of his security, it went in mitigation of damages.

That the judgment and execution offered in evidence by defendants having been rejected, the defendants were, as to the residue, to be looked upon as wrong-doers.

The jury found for the plaintiff £56 18s. damages.

The plaintiff's counsel wished the jury to be directed to assess contingent damages of 1s. as against Baskerville, on the issue in law, in case the plaintiff's failure on that issue might affect his right to recover the amount of the verdict, as rendered against the other defendants. This was objected to by the defendant's council, and the request was not complied with.

In Easter Term last, *Dr. Connor*, Q. C., for defendants, obtained a rule upon the plaintiff, to show cause why the verdict should not be set aside, and a new trial had for misdirection, and the improper rejection of evidence, &c.; citing *Finch v. Blount*, 7 C. & P. 478; *Young v. Cooper*, 6 Ex., R. 259; *Jones v. Davis*, *ib.*, 663; *Chapman v. Jones*, 2 Ex. R. 802.

Wilson, Q. C., for plaintiff, moved a cross rule upon the defendants for a new trial, in the event of the demurrer being decided against him, which was allowed to be made, but the consideration of it deferred till the demurrer was disposed of.

Mr. *Wilson* shewed cause against the defendants rule, during the same term, and contended that,

1st. Whether the seizure or the sale was regarded as the conversion, the evidence was sufficient as against all the defendants.

2nd. That the bond of indemnity was evidence against all, and sufficient to render them liable, as instigating the sale and accessory to the act.

3rd. That the plaintiff's saying he had no goods was unimportant and could not bind his right; that the defendants disbelieved his assertions as to his right, and alleged that the goods were his, wherefore they are as much bound by their assertions as he is.

4th. That all are wrong doers *ab initio*, upon the evidence.

5th. That as to the rejection of the judgment and *fi. fa.* the authorities were conflicting, but he was disposed to deem them admissible under the pleas of not guilty, and not possessed, &c.—Webb v. James *et al.*, 7 M. & W. 283; Bingham v. Clements, 12 Q. B. 260; Whitmore v. Green, 13 M. & W. 104; Mayhew v. Herrick, 7 C. B. 229; Higgins v. Thomas, 8 Q. B. 908; Brierly v. Kendall, 16 Ju. 449; White v. Morris, 16 Ju. 500.

6th. He said the jury misapprehended the observations made by the learned judge who tried the cause on the subject of damages, and was willing to accede to a new trial, if legally admissible.

7th. That rejecting the proof of the execution was immaterial, because if it had been proved, the bill of sale shewed the plaintiff entitled to recover in law, as in possession, and the defendants did not allege any fraud invalidating such bill of sale; that if proved, the judgment and execution would be no defence, and therefore there was no ground for a new trial.

He considered the plaintiff's right to damages greater in respect of the conversion in trover, than in trespass founded on a nude possession.

Gwynne, in reply, said the difficulty arose from the execution debtor in possession of goods, as ostensible owner, disputing in an action of trover his execution creditors' right to seize and sell the same—Unwin v. St. Quentin, 21 M. & W. 278, 280-1-2; Whitmore v. Green, 13 M. & W. 107.

That the judgment and execution were admissible, and if received defendant must have obtained a verdict, being justified as against plaintiff by the execution; and that for

any excess in the levy or sale the sheriff was answerable, not the defendant,—and in case, not trover.

That the plaintiff was not entitled to the value of the goods, but merely to compensation for his contingent interest therein prematurely sold, and he referred to the argument and cases on the demurrer, which had been previously argued on the same day; that the bill of sale was impeachable for fraud, but could not be attacked until the judgment and execution were in evidence; and if the defendants had succeeded as to the execution, the plaintiff could not in this form of action have proceeded for the excess.

Dr. Connor, Q. C., on same side, referred to *Young v. Cooper*, 6 Ex. R. 155; *Jones v. Davies*, 6 Ex. R. 663, *Howell v. McGuire*, 7 Ex. R. 80; *Cheesman v. Exall*, 20 L. J. Ex. 209; *Finn et al. v. Billteston*, 21 L. J. Ex. 41; *Bingham v. Clements*, 12 Ju. 580, 12 Q. B. 265.

MACAULAY, C. J.—The first question is, whether the evidence *prima facie* supported the action as against all the defendants under the plea of not guilty.

If the original seizing was the conversion relied upon, it would be necessary to consider whether the subsequent acts of the defendants implicated them therein severally, so as to render them jointly liable.

But if liable for the conversion by sale, which is the gist of the action, it is unnecessary to determine the question of relation; that some of the defendants,—as Israel Shepard and Baskerville,—were answerable for both seems very clear; the only question is, whether the other two Shepards are equally so; that depends upon the force and effect of the paper signed by them on the 24th of December, and of the bond of indemnity also executed by them on the 7th of January. Although the name of Thomas Shepard is not mentioned as a party in the first instrument, his conduct in signing it shews his concurrence in what had been done, and his desire that the bailiff should continue in possession under the seizure he had previously made: the bond is an explicit adoption or approval of the seizure *ab initio*, and guarantees the indemnity of the sheriff as an inducement to sell.

I cannot bring myself to doubt the liability of all parties to this board for a joint conversion by the subsequent sales—Whitmore v. Green (13 M.&W. 104), White v. Morris (16 Ju. 500), Samuel v. Duke (3 M. & W. 630), shew that taking a bond of indemnity will not estop a sheriff or shew malice on his part.

But it is a common mode of implicating a plaintiff in the execution that he gave a bond of indemnity to the sheriff—Barker v. Braham (3 Wil. 368), Davies v. Jenkins (11 M. & W. 745), Freeman v. Rosher (13 Q. B. 780), Bul. N. P. 41, Menham v. Edmonson (1 B. & P. 369-71), Whitmore v. Greene (13 M. & W. 107-8-11), Caterall v. Kenyon (3 Q. B. 310.)

2nd. The next consideration is, whether the plaintiff proved a sufficient *prima facie* case to enable him to maintain trover under the pleas of not guilty and not possessed.

The opinion expressed upon the demurrer disposes of this point; it was then said that as against a wrong-doer, or as against all the world but O'Donahoe, the plaintiff's possession, with his assent, was sufficient evidence of property and right of possession to sustain the action.

3rd. If liable at all, I think the defendants liable for the excess in the sale beyond what was necessary to realize the amount of the execution, as well as for what was necessary. But if not, the present verdict is only for the value of the goods so sold, or for goods to that amount, and the objection seems immaterial.

The principal question is, whether I ought to have admitted proof of the judgment and execution on behalf of all or any of the defendants, under the pleas of not guilty and not possessed.

According to the impression I entertained respecting the effect of the new rules in trover, I certainly thought the matter should be specially pleaded when the execution creditor and those acting under him seek to justify the conversion of the plaintiff's goods, and that plaintiff's goods were taken out of his actual possession—Bruit v. Perry (7 U. C. Q. B. R. 24-9, 12 Q. B. 265), Taylor's Evidence, 223.

But the cases cited seem now to have reduced it to the

consideration whether a special plea of this kind can be pleaded in trover, and whether the special matter does not amount to the plea of not guilty or not possessed, leaving no room for questioning the defendant's right to give such matter in evidence under such pleas: my views upon the question whether a special plea of justification in trover can be pleaded will be found expressed thereupon in another case on demurrer appealed from the County Court.

As at present advised I can only say, that in submission to the recent decisions in England, I am bound to hold that the defendants were entitled to give the special matter offered in evidence under their pleas as pleaded. I had supposed that the new rules placed trespass for taking goods, and trover for their conversion, on the same footing as respected pleas of justification, when the plaintiff's possession and right of property were not otherwise disputed, but the cases do not warrant an adherence to such impression—*Leake v. Loveday* (4 M. & G. 982-34).

There should therefore be a new trial, without costs, on this ground, if it can avail the defendants, after what has been said on the subject of the special plea of *Baskerville*, and the replication thereto, in disposing of the demurrer. It may do so if after all that has occurred the defendants can impeach the mortgage to *O'Donahoe* as void against creditors; otherwise not, if the opinion expressed upon the demurrer be correct.

CORBETT V. SHEPARD ET AL.

Where a verdict was rendered against four defendants, but one afterwards had judgment on demurrer for mispleading given in his favor,

Held, that plaintiff could enter judgment against three defendants, omitting the one who had judgment on demurrer.

This is a cross rule, obtained by plaintiff to set aside the verdict in his favor, and for leave to amend the replication demurred to and reply *de novo*.

For the pleadings, see the last case. There are four defendants. Three pleaded jointly not guilty and not possessed, the action being *trover*. The fourth defendant

pleaded separately similar pleas, and also a special plea of justification, to which plaintiff replied and defendant demurred specially. The case was tried before the demurrer was argued, and a verdict rendered for plaintiff against all the defendants, with damages £56 8s.

The demurrer was afterwards argued and deemed good, but judgment was deferred to enable plaintiff to take out and discuss this rule, which had been deferred until the event of the demurrer, and afterwards until defendant's counsel should elect whether he would ask for judgment on his rule nisi, the court having intimated a readiness to make it absolute without costs, for misdirection. He declined asking for judgment when this rule issued.

Dr. Connor, Q. C., for defendant, shewed cause.

Now *Wilson*, Q. C., for plaintiff, says he is willing his rule should be discharged, if in the opinion of the court he can enter judgment against the other three defendants, notwithstanding the verdict against all the four, and the joint assessment of damages; but if not, he presses for relief.

Defendant's counsel objected to any relief on the plaintiff's rule being discharged, on the ground that plaintiff can take judgment on the present verdict against the other defendants. He then desires his rule still with the court to be made absolute without costs.

MACAULAY, C. J.—Upon looking into the cases, it appears to me very doubtful whether the plaintiff can take judgment against the three Shepards or not, leaving the defendant Baskerville to take judgment in his favor on the demurrer. The case of *Bigger v. Greenfield* (2 Lord Raymond 1572), and the principle upon which it rests, favour the defendants, and if the present demurrer had involved the merits and been decided upon on grounds going in bar of the action in substance, that case would have been much in point. The demurrer, however, has been disposed of on technical or formal grounds of exception, and that of course appears on the record. It does not establish that in point of law the plaintiff had no course of action against any one for any of the goods in relation to the conversion of which the

defendants are jointly accused and all found guilty under the general issue. This distinction induces me still to incline to the opinion that on the whole record the plaintiff may take judgment against the three defendants, omitting the fourth, on the ground that the judgment in his favour having been given by reason of misleading, and not on the merits, would not estop the plaintiff even in another action against him, or in a separate action against the other defendants; and if not then, not in this action as against the other defendants.—*Baker v. Booth* (2 U. C. R., O. S., 373 409), *Elwood v. Bullock* (6 Q. B. 409), *Godson v. Smith* (2 Moor 157, Cro. El. 668), *Lampen v. Keedewin* (1 Mod. 207, 3 Wil. 309), *William v. Gwynn* (2 Sand. 47).

I apprehend a *nolle prosequi* could not be entered to get rid of the defendant Baskerville's right to judgment in the demurrer.

It was not offered to be entered at the trial, nor could it seemingly have been so entered.

The effect, if then or now entered upon the case as respects the other defendants, would become a question—could it be done and was done; probably if it could regularly be done it would not affect their liability, as not estopping or concluding the plaintiff as against the defendant Baskerville in any other action than this.

In this doubtful state of the question I am disposed to think the better course (rather than delay the case till after the next assizes) is to make the plaintiff's rule absolute on payment of costs, if he elects to take on those terms; or, if he declines, to discharge it without costs, and then to make the defendant's rule absolute without costs, if he elects to take it—if not, to discharge it also without costs; each or either party to signify his election to the other within two days after being requested to do so by the other.*

McLEAN, J., and RICHARDS, J., concurred.

*Note by MACAULAY, C. J.—With respect to the decision of the demurrer so far as it depended upon the objection of duplicity, I take this opportunity of referring to the case of *Monkman v. Shepardson* (1 Ar. E. 412), reporter's note referred to in Tyr. Plg. 688, which I had not seen till after the demurrer was disposed of. It may be found to conflict with the views expressed touching the invalidity of the replication, accompanied by a new assignment when separable in themselves, and one only is bad on the demurrer applied separately.

McLACHLIN V. DIXON.

Double fronts—Side lines.

In the township of Albion the lots are generally surveyed with double fronts, but lot 31 in 7th con. was not so surveyed, the Adjala road forming the northern boundary. The side line between Nos. 30 and 31 was run from the southern front to the centre of the lots, but was not carried through to the Adjala road.

Held, that such side line should be run through in a direct line from the southern front to the Adjala road.—McLEAN, J., *dissentiente*. (a)

Writ issued 11th November—Declaration 3rd December, 1852.

Trespass *quare clausum fregit*, for that defendant on the 11th of August, 1852, and on divers days and times, &c., *vi et armis*, broke and entered a close of the plaintiff in the township of Albion, called and known as Lot No. 31, in the 7th concession of Albion, &c.

Pleas—1st. Not guilty. 2nd. Not possessed, and issues.

The cause was tried before Mr. Justice McLean at the Toronto winter assizes, January 1853, when it appeared that the township of Albion had been laid out in the original survey into concessions and lots with double fronts, the concessions being numbered from the south northwardly, and the lots numbered from the east westwardly, with a supposed width of 30 chains, and depth of 66 chains and 67 links: that the northerly side of the township is bounded by a road called the Adjala or Tecumseth road, into which the concession roads of the township of Albion run, as also the side or division roads between the lots bounded by such roads, though, of course, in different directions, as shewn by the official plan of the township; that the Adjala road cuts the lots bounded thereby, not at right angles but diagonally, so that the highest numbered lots in Albion abutting thereon are broken lots, some being triangular lots and others with one corner cut off, or the whole front on the Adjala road cut off so as to form angles on that side of the lot, acute or obtuse, and not corresponding with the opposite angles of the lot, which are right angles: that the highest numbered lot in the 6th concession is numbered 32, the highest in the 7th concession 31, and the highest in the 8th concession 30: that No. 31 in the 6th concession, and also

Note (a) This case was afterwards appealed and the judgment of the Court reversed—the holding of Mr. Justice McLean being upheld.

No. 30 in the 7th concession, have each angles alike at three of the corners, with the north-west corner cut off by the Adjala road: that No. 31 in the 7th concession (the one in question), is a triangular lot according to the Government plan, bounded on one side by the allowance for road between the 6th and 7th concessions, on another side by an allowance for road between it and lot No. 30, and on the 3rd side by the Adjala road: that original posts were planted to mark the allowance for such side road between the lots Nos. 30 and 31, in that part of the said lots which faces or is opposite the 6th concession, also at the limit between lots Nos. 29 and 30, on the same front, and at the south-east or easterly angle of 30, 7th concession, on the front facing or opposite to the 8th concession. Also, that posts were planted at the points where the side lines or limits of the several concession roads intersected the Adjala road, but not at the points of intersection of the side or division roads or of the limits between lots, and that the concession roads between lots Nos. 29, 30 and 31, in the 6th and 7th concessions, and between Nos. 29 and 30, in the 7th and 8th concessions, to their intersection with the Adjala road, are undisputed.

These concession roads therefore mark the south-west fronts of Nos. 30 and 31, 7th concession, and the imperfect parallel or north-east front of No. 30, 7th concession, until it meets the Adjala road, and the Adjala road defines the diagonal fronts or sides of each of these lots (Nos. 30 and 31), on that road; that the distance from the allowance for road between the said lots Nos. 30 and 31, 7th concession, on the front which faces the 6th concession to the Adjala road, exceeds the full depth of half a concession of 33 chains and $33\frac{1}{2}$ links, and it is said that the distance from the same point to the entrance of the concession road between the 6th and 7th concessions into the Adjala road exceeds the full width of a lot of 30 chains: that by running the side lines of these lots from those points or angles where posts had been planted parallel to the course of the side line at lot No. 1, the centre of the 7th concession, may be accurately ascertained, but that lines run from the two

posts placed to mark the front angles of lot No. 30, at the lower or southerly side thereof, will not meet at the centre of the concession, and the line traced from the corner post or the south west angle of the lot No. 30, facing the 6th concession, will be nearer lot No. 1, of that concession, and more remote from the Adjala road than the line traced from the corner post of the opposite or south-east angle of the said lot facing the 8th concession—the distance between the points where they severally intersect the centre of the concession being between 6 and 7 chains: that the line or limit of the side road between Nos. 30 and 31, 7th concession, was not traced from the westerly side of these lots through to the Adjala road in the original survey, and that the present difficulty is to determine whether the allowance for road between these lots from the 6th concession fronts to the centre line of the 7th concession, should be continued through to the Adjala road; in other words, whether the allowance as indicated in the original survey is to be continued on the same line parallel to the governing line of lot No. 1, through the whole depth of these lots, until it intersects the Adjala road or only to the centre line of the concession; and in that event, how the allowance for road between such centre line and the Adjala road is to be determined, in consequence of what is called the jog, caused by the corner posts at the lower or southerly angles of lot No. 30 not being opposite upon the course of the side lines of the concession.

That on the 12th of October, 1838, the east part of lot No. 30, 7th concession of Albion, (being apparently the residue of the lot exclusive of a full west half lot) was granted to the person under whom the defendant holds and described in the government patent as containing 70 acres more or less, commencing where a post has been planted at the easterly angle of the said lot; then north $45^{\circ} 45'$ west 10 chains, more or less, to the allowance for road on the northern boundary of the township; then south 74° west 35 chains and 50 links, more or less, to the allowance for road between lots Nos. 30 and 31; then south $39^{\circ} 30'$ west 1 chain and 50 links, more or less, to the centre of the concession; then south

45° 45' east 30 chains, more or less, to the southern limit of the said lot ; then north 39° 30' east 33 chains and 33½ links, more or less, to the place of beginning : that lot No. 31, 7th concession of Albion, having been sold by the government to the plaintiff for £17, was on the 27th of July, 1850, granted to him as containing 34 acres, be the same more or less, without any other description ; and the trespasses complained of are upon the northerly angle of this lot, and westerly of the allowance for road between lots Nos. 30 and 31, as laid down in the copy of the government plan produced from the posts planted at the front angles of 30 and 31—facing the 6th concession, and as contended by the plaintiff. But the defendant contends the *locus in quo*, by reason of the jog already mentioned, was included in the grant of, and forms part of lot No. 30, in which event he is not guilty of trespassing upon lot No. 31, and the difficulty is to decide upon the true boundaries of and between these lots upon the ground.

In the first place, the actual possession of the *locus in quo* was disputed in the second—the place—whether it composed part of lot No. 31, was contested with respect to the possession. There was a struggle between the parties, each sowing and planting grain, potatoes, &c., upon the *locus in quo*, and each attempting to reap or gather therefrom.

A person named Davidson had erected a shanty upon a part of the *locus in quo* several years ago ; having entered, as he said, under the defendant, and before the plaintiff came there. And in the contradictory nature of the evidence, it seems to me, that so far as the case turned upon possession, it should depend upon ownership. (a) Acts of trespass by the defendant were clearly proved, and whether these acts were upon the plaintiff's possession depended upon whether they were upon any part of lot No. 31, which he owned and possessed. Then, as to boundaries, three different lines were run by different surveyors—namely, Walsh, Kelley and Prosser, according to Welsh or Walsh and Dennison's line, the *locus in quo* is clearly a part of lot No. 31, for that line merely extended the allowance for road between

(a) 12 A & E 624, 7 M & W 312, 2 Ex. R. 821.

30 and 31, from the 6th concession road on the course of the side lines through to the Adjala road. According to Kelley's line, the principal part, if not all the trespasses complained of, would be upon lot No. 30, for that line seems to have been traced from the centre of the 7th concession to the Adjala road, commencing at the distance of 30 chains parallel to the line of the concession road from the point where a line drawn parallel to the side or governing line from the post at the south east angle or easterly angle of lot No. 30 (*i. e.* from the place of beginning, called for in the Government patent for that lot) meets the centre of the concession. Kelley's line, being of course, also parallel to the side line of the concession. This line passed either through or very near this Davidson's shanty in front or rear—the evidence tending to shew that it was in the rear rather than in the front.

According to Prosser's line, the *locus in quo* was all within the limits of No. 30, owned by defendant, and formed no part of lot No. 31; consequently, adopting either Walsh or Kelly's line, the plaintiff would be entitled to recover; but adopting Prosser's, the defendant would be entitled to a verdict. Prosser's line was ascertained by tracing from the south-east angle of No. 30, or place of beginning, according to the patent, thence to the Adjala road, in the course of the allowance for road between the 7th and 8th concessions—the distance being 14 chains instead of 10, as called for by the patent; thence along the southerly side of the Adjala road 35 chains and 50 links, the distance (more or less) specified in the patent; thence parallel to the southerly or concession line 3 chains and 37 links to the centre of the 7th concession. The patent calls for 1 chain and 50 links more or less, from the Adjala road to such centre; and if the line along the Adjala road be continued in a westerly direction until within 1 chain and 50 links of the centre of the concession, it will encroach still further upon lot No. 31 as claimed by the plaintiff, and give the defendant more land than he claims on this occasion, as a reference to the plan clearly shews. But if 5 chains and 50 links, instead of 1 chain and 50 links, be adopted in consequence of the excess of 4 chains more

than is called for from the place of beginning to the Adjala road, the length of the line along the Adjala road will be shortened accordingly. According to Prosser's survey, the defendant would have 77 acres in lot No. 30, and plaintiff nearly 76—the plaintiff's patent mentioning 34 acres and the defendants 70 acres more or less respectively. If Welsh's line was adopted, the defendant's would be reduced to 66 acres for No. 30, and the plaintiff's increased to 81, (Some of the surveyors said 83 and upwards for No. 31, contrary to what the patents specify and the government plan indicates). From the south west angle to the north west angle of No. 30, (*i. e.* the front of No. 30, on the road between the 6th and 7th concessions), and to the allowance for road between Nos. 30 and 31 is 34 chains and 38 links, being an excess of 4 chains and 38 links, according to the width allowed for the front of full lots throughout the township; but there are what are called jogs, in tracing the side lines from the double front posts to the centres of concessions, as exhibited by the plans produced. The difficulty is upon what principle or data the limit between lots Nos. 30 and 31, 7th concession, in that part next adjoining to the Adjala road, is to be determined.

The learned judge who tried the cause expressed to the jury his approbation of Prosser's line, and a verdict was rendered for the defendant. In the following term, *Hallinan* for plaintiff, obtained a rule upon the defendant, to shew cause why such verdict should not be set aside, and a new trial be had, with costs to abide the event, on the ground of the reception of inadmissible evidence, for misdirection, and on grounds disclosed in affidavits filed. The affidavits are of Wlash and Dennison, deputy provincial surveyors, and merely go to impugn the principle of Prosser's line and to support Walsh's.

Cooper shewed cause, and filed the affidavits of Dixon and Prosser, two of the witnesses examined on the defence, to repel the affidavits filed by the plaintiff. He also referred to the provincial statute 12 Vic. ch. 35, sec. 32, 37, 38 and 44, as shewing how the lines of lots surveyed with double fronts were to be run, and the method to be pur-

sued where no traces of survey can be found, and urged that whether irrespective of the patent for No. 30, which preceded that for No. 31, and was to prevail over it if they clash, or with the patent to guide, the *locus in quo* composed part of lot No. 30, and not of 31. His views in this respect were expressed at some length.

Hallinan, in reply, said that as to the patent for the east part of No. 30, that the question is what was intended to be granted thereby, and submitted that it could not be construed to embrace any land not part of No. 30, according to the original survey, as ascertained irrespective of the patent. He referred to *Doe dem. Gildersleeve v. Kennedy*, 3 U. C. Q. B. R., as shewing that the government plan was to be referred to and taken in connection with the patents, and if so, that the allowance for road called for in the patent for No. 30 can only be the allowance for road as left on the westerly side of 30 and 31, continued to the Adjala road: that the survey was intended to be accurate, and if it had been so, or if there had been no double fronts, there would have been no jogs; and that when the survey was not carried out, but is still to be performed, jogs should not be made, contrary to the intention, merely to square with previous inaccuracies: that the 40th sec. of the act provides that when there are no posts the government plan is to govern, as indicating the operation of the original survey as officially reported, and as being the basis of the government grants: that it is a question of intention; and the original survey and plan combine to shew that the allowance for road as left on the westerly side of No. 30 and 31 was intended to be so left to connect with the Adjala road. He also contended that 30 chains being allowed on Kelly's line would exclude part of what the plaintiff claims, and that *quoad* that he was entitled to recover. As to possession, Mr. *Cooper* thought the weight of evidence in defendant's favour. Mr. *Hallinan* submitted that it must depend upon the title or identity of the lots.

This case was first argued before Mr. *Chief Justice Macaulay*, *McLean J.*, and the late *Sullivan J.*; but Mr. *Sullivan* having died before it was decided; and *Macaulay*

C. J. and *McLean J.* not being able to agree upon it, it was in last term (Trinity-Term 17th Vic.) re-argued, in order that the opinion of Mr. *Justice Richards* might be obtained.

MACAULAY, C. J.—The pro. stat. 50 Geo. III, ch. 1, sec. 12, enacted that all allowances for roads made by the King's surveyor in any township, &c., shall be deemed common public highways, &c.

The 12. Vic., ch. 35, (which repealed the 59 Geo. III, ch. 14,) sec. 32, enacted that all boundary lines of townships, all concession lines, governing points, and all boundary lines of concessions, and all side lines, and limits of lots surveyed, and all posts or monuments that had lines placed or planted at the front angles of any lots, &c., under the authority of the executive government, &c., should be and were declared to be the true and unalterable boundaries of every such township, concession and lots respectively, and whether the same should upon admeasurement be found to contain the exact width or more or more or less than the exact width expressed in any letters patent grant, &c., therefor, or for any aliquot thereof, &c. Sec. 35 provided that the course of the boundary lines of concessions on the side from which the lots were numbered should be the course of the division or side lines throughout the several townships in Upper Canada, if so intended in the original survey, and that all division or side lines should be run parallel thereto. Sec. 36: that the front of each concession, where only a single row of posts had been planted in the concession lines and the lands had been described in whole lots, shall be that end of the concession which is nearest the boundary of the township from which the concessions are numbered, with a provision for cases in which the front lines of concessions were not run in the original survey, having due respect to any allowance for road made in the original survey—See the 1st proviso. Sec. 37 enacted that in those townships in which the concessions have been surveyed with *double fronts*—that is, with posts or monuments planted on both sides of the allowances for roads between the concessions and the lands

—shall have been described in half lots, the division or side lines shall be drawn from the posts at both ends to the centre of the concession, and each end of such concession is declared to be the front of its respective half of such concession, and that a straight line joining the extremities of the division or side lines of any half lot in such concession, drawn as aforesaid, should be the boundary of that end of the half lot which had not been bounded in the original survey. Several other sections of this act were recited in the case of *Keeley v. Harrigan* decided last term.

In this case, although the township of Albion generally was surveyed with double fronts, Lot No. 31 in the 7th concession was not so surveyed nor was it described by metes and bounds by the patent. The presumed course of operations may have been that in running up from No. 1, between the 6th and 7th concessions, the south west angle of No. 30 was first posted, then the north west angle—then the south west angle of No. 31, fronting towards the 6th concession, with an allowance for road between. There is no evidence that the concession road was carried any further towards the Adjala road; but the allowance through was no doubt intended to be made, and there may have been posts planted at its intersection with the Adjala road. The distance, it is said, exceeds 30 chains, and yet no lot No. 32 is laid off; that afterwards, the division between the 7th and 8th concession was run, and a post planted at the south east or easterly angle of No. 30, 7th concession. Posts may have been also planted at the intersection of the 7th and 8th concession road with the Adjala road. No other posts were planted to mark the angles or fronts of the broken or north east parts of 30 and 31, and yet the government plans and the patent for the east part of No. 30 import an allowance of road between the easterly parts as well as the west halves of these lots, reckoned from the centre line of the concession. In determining the position of such road, it is said, the patent for Nov. 30, may be taken as a guide; but the objections to it are, that no distance therein is specified, each being expressed to be more or less. From the place of beginning

to the Adjala road, is in fact, 4 chains more than the patent supposes; and if a line be drawn westwardly from the distance of 10 chains—*i. e.* 4 chains from and parallel to the Adjala road—it would intersect the centre line of the concession at a point much within the point of intersection by the Adjala road as it is, and would of course meet or pass the allowance for road between No. 30 and 31, continued from the west to the centre, nearer by 4 chains, or about half the distance between the centre of the concession where the side road meets it and the Adjala road. Then, if the easterly line of No. 30 be continued to the Adjala road, and a line be traced upon such road towards No. 31 35 chains and 50 links, it does not bring you to a point 1 chain and 50 links from the centre of the concession, as the patent supposes; and to stop there instead of going on to within 1 chain and 50 links of the centre line of the concession, or of stopping short within 5 chains and 50 links from the centre line of the concession, or when opposite the allowance made for the side road on the westerly fronts of the lots 30 and 31, is merely arbitrary, and not sanctioned by anything called for that is visible upon the ground or established by an original survey; so the supposed distance from the Adjala road of 1 chain and 50 links in the patent is more or less, and from the centre to the place of beginning is 30 chains more or less. The only specific calls in the patent are the place of beginning, the Adjala road, and the allowance of road between lots Nos. 30 and 31, which it calls for as boundary of No. 30 on the northerly side. Then to trace from the place of beginning to the centre of the concession on a course parallel to the side line of No. 1, and thence to trace up 30 chains along the centre for the true width of No. 30, according to the plan of the township and the intended operations in the original survey, is adopting a line and distance not run or intended to be run or indicated as a boundary in the original survey, nor ascertained by the 12 Vic. ch. 35, sec. 37, if applicable, until both side lines are traced to the centre, the ends of which are to be joined by this line. It is also assuming that if the outlines of the lot 30 had been all run, an accuracy

would have been observed in determining the width of No. 30 on the easterly side that did not prevail on the westerly side, and which confessedly did not exist throughout the township or in that lot.

It appears to me that the object should be, so to carry out the division line or side road between Nos. 30 and 31, as best to harmonize or correspond with what was actually done in the original survey, and I cannot persuade myself that it is not more correct to take as the basis or governing point the allowance for road as laid out on the westerly front or side of these lots which preceded the survey on the easterly side of No. 30, than to adopt the latter operation—namely, the post planted at the south east angle of No. 30, without any tangible guide beyond it exclusive of the Adjala road. It is a question of intention or of fact with what design the allowance for road was made between lots 30 and 31 on the westerly side, and I think what was done and what was omitted to be done in the original survey combine to indicate that it was left to be carried through to the Adjala road, the ground not admitting of either lot being run with another or double front, especially No. 31. And I do not see how the limit between the unsurveyed broken parts, not halves, but less than halves, of Nos. 30 and 31, could be ascertained with reference and in subservience to the original survey, so satisfactorily as by tracing the side line through to the Adjala road on a course parallel to the governing side line of the concession.

This process can be applied to all the broken lots bounded by the Adjala road, and the present question is not necessarily confined to the lots in the 7th concession, but may extend to the whole northern boundary line of the township. It seems to me to accord better with the intentions of the statute, although the act does not expressly provide for the present contingency. It is supported by the government plan so far as that can be adverted to and used as a guide, and is less arbitrary than the other method suggested. (a) Lot No. 31, was not in fact surveyed with double

(a) *Badgley v. Benson*, 3 U. C. R., C. S. 221; Stat. 12 Vic. ch. 31, sec. 12, 13, & ch. 35; Ex. 35, &c.

fronts. The allowance for road between 30 and 31 called for in the patent for No. 30, is no otherwise indicated or traceable on the ground than by continuing the allowance that was made through to the Adjala road. That allowance was made at a period of the survey when it could not be known and was not anticipated that the post to be afterwards planted to mark the south east corner of No. 30, in front of the said concession, would not be in a direct and true line with the one that had been planted at the south west angle, and it might have been placed as much south or short of that line as it really is north or beyond it. Had the jog been just the reverse, No. 30 would then, according to my hypothesis, have gained in greater proportion or quantity than No. 31 does as it is. The side road prolonged through to the Adjala road will abridge the defendant's quantity only about 4 acres, as I understand the evidence; and if the large excess in No. 31, beyond what was contemplated by the government, constitute a sufficient reason for repealing the patent to the plaintiff, on the ground that Her Majesty was deceived in the premises, or upon any other ground, the error may be corrected in that way; but I am not prepared to adopt a view that is calculated to require jogs or lines to be run in erroneous places, where no previous survey was made, merely because jogs and errors of a like kind had been committed in the survey that was made in other places. I deem it more consonant with the intention of the original survey, and of the government grants, that when posts actually planted in the original survey, do not create jogs; the lines remaining to be run or completed between the broken ends or parts of the lots intersected by the Adjala road should be traced in continuation of the lines indicated by the posts planted on the westerly sides thereof; in other words, on the only fronts or the only complete fronts of such lots. If they had parallel double fronts, the present question would not have arisen. Treating those portions of Lots Nos. 30 and 31 that lie between the Adjala road and the centre line of the 7th concession, as if in a separate or independent concession from the westerly parts, you would have nothing on the ground to guide

you except the easterly angle of No. 30, the Adjala road, and the intersection of the allowances for road between the 6th and 7th and 7th and 8th concessions with that road, without anything to determine the true position of the allowance for road between 30 and 31. In that event a reference to the government plan showing the width of lots might entitle No. 30 to the full distance of 30 chains on the centre line of the concession, leaving only the residue for No. 31. But when it was found that an allowance for road upon such a line would not meet the allowance left between the other parts of the lots in the original survey, and that a road not doing so would not fulfil the intention indicated by the government plan, a question would arise which intention was to predominate—a full width to the Lot No. 30, or an allowance for road meeting the other so as to admit of a continuous road leading from the concession road between the 6th and 7th concessions to the Adjala road. The public convenience would seem to indicate that the allowance for road should predominate and correspond with the allowance made according to the intention of government, although the effect might be (owing to erroneous surveying) to deprive the end of No. 30 adjoining the centre line of the concession of the full width of 30 chains. If the southerly line of No. 30 had been six or seven chains more southerly, or nearer the front of the concession, its width would have been increased beyond 30 chains—*i. e.*, up to the division road—on the same principle. Moreover, I am not disposed to think these broken halves or parts of lots are to be looked upon as independent concessions. The fact is not so; and in every scheme of survey where posts are planted on one side only of the concession to mark the front angles of the lots, the allowance for side roads always runs from one concession road to another, so as to afford a continuous line of communication; it is the object with which they are left. The method of survey by double fronts may prevent this object being fulfilled when jogs occur; but when broken lots are only surveyed, and posts planted on one front, the object of leaving an allowance for a division road in such survey (no other survey of the lots

being intended) would seem to indicate that in accomplishment of the object it should be continued on to the next road with which it can intersect, so as to afford a direct communication through from one concession road to the other. If I were satisfied my views are incorrect, and that some other principle was to be adopted, I should be disposed to think the course suggested by Kelly as the most satisfactory, because it would give No. 30 its full width on the only side—viz., the west, or the centre line of the concession—which afforded space for its full complement, leaving the residue to No. 31 as a broken or imperfect lot in point of quantity. If Kelly's line were adopted—that is, if 30 chains were allowed for the width of No. 30 on the centre line of the concession—it appears to me the defendant would still be a trespasser on a small part of Lot. No. 31, though much less in extent than in my view of the subject. Of course if Prosser's line—in other words, the ruling of the learned judge at Nisi Prius—was adopted, the defendant would not be a trespasser at all, and the verdict would be right. I may add, that the late Mr. Justice Sullivan, whose loss we all so much deplore, was much disposed to adopt Kelly's as the most satisfactory hypothesis; though when he last spoke of the case he seemed to have relinquished it, and to have inclined to believe Prosser's method as the best, and that the ruling of the learned judge was correct.

McLEAN, J.—The trial of this suit took place before me at the Toronto assizes in January last, and a verdict was rendered for the defendant, with which verdict I was at the time and am still perfectly satisfied.

The defendant is the owner of the east part of lot No. 30, 7th concession, under a patent dated 12th October, 1838, which describes the particular parcel of land granted to him by metes and bounds; the plaintiff is the owner of lot 31 in the same concession, the patent from the crown to him bearing date the 27th July, 1850, not specifying any boundaries; both lots are of irregular shape, the line dividing the townships of Adjala and Albion forming the northern limit of each. The concessions in Albion were all run

with double fronts, running nearly north and south—the lots running nearly east and west, and numbering from the south—the front of the township.

Unfortunately, as in all cases of similar surveys, the lines of the lots on the east and west fronts do not meet and correspond, and it could scarcely be expected that they would, as it must be evident that from the irregularities of the ground, and even from the stretching of the chain, or any mistake however small, all the division lines of lots in a concession would be affected and prevented from corresponding in such a manner that a side line of a lot would be perfectly straight from one front of a concession to the other. The lines of the east part of lot No. 30, owing to the manner of survey, are now in fact some chains farther north than the side lines of the west part of the same lot, and hence it follows that the allowance for road between lots Nos. 30 and 31 cannot be a straight line through the whole concession, but must be found on the north side of No. 30, wherever that may be, in each front of the concession. By the act 12 Vic. ch. 35, sec. 37, it is provided that the survey of concessions with double fronts shall be made *precisely as if the several fronts formed distinct concessions, the lines of one not being in any respect a guide for the lines in the other*. The defendant's lot, being part of one of those lots surveyed with double fronts, must be surveyed without any reference to the portion of the same number on the west front, or any allowance for road which may be found between that number and 31 on that front. At the time the patent under which the defendant holds was made the whole ground, composing Nos. 30 and 31, belonged to the crown, and in 1838 it must have been well known to the government that the allowances for roads, and the side lines of lots in the several fronts of the concession, did not meet, but that in fact there is a considerable space between them, so that what was intended to afford a continuous line of road through the concession could not do so. With the knowledge which they must have had on the subject the government issued the patent for the defendant's part of lot No. 30, precisely in the same manner as for any other *half*

lot in the same front of the concession. Had it been intended that the allowance for road in the west front should be continued straight to the Adjala line, the grant might easily have been limited, so that it might so continue. By the evidence it appears that had it been so limited the defendant would have 66 acres instead of 70, which the patent contains. On the ground the lot is found, by surveying according to the terms of the patent, to contain 77 acres, being 7 acres more than the patent professed to grant; while the plaintiff's lot, granted as 34 acres, contains nearly 76, and if the land in dispute is considered as belonging to it he would have $83\frac{1}{4}$ acres according to the measurement of Dennis and 83 and 20 perches according to Walsh's measurement, more than double the quantity for which the government have been paid or which they intended to grant. By the boundaries specified in defendant's patent he is entitled to begin at a post between Nos. 29 and 30 on the east front of the 7th concession; that point, according to the evidence, is undisputed. From thence on the concession line, according to the patent, 10 chains to the Adjala line; on the ground however the distance is found to be fourteen chains, and thus the quantity of land is increased to 77 acres instead of 70. Then the patent authorises the defendant to run south 74 degrees west along the Adjala line 35 chains 50 links more or less, to the allowance for road between lots 30 and 31. It does not appear that any posts were planted along the Adjala line, shewing where such allowance for road would intersect it; but it is evident that the government were aware that at the distance of 35 chains 50 links from the intersection of the Adjala line by the central line of the concession there would be found sufficient ground for an allowance for road—run from a point on the Adjala line only 1 chain and 50 links to the centre of the concession—for the next course given in the patent, when the allowance for road is reached, is south 39 minutes west 1 chain 50 links more or less, to the centre of the concession. The defendant, instead of continuing along the Adjala line to a point at the distance of 1 chain and 50 links from the centre of the concession, has only

gone the exact distance of 35 chains 50 links; and from thence on the course prescribed 3 chains and 37 links to the centre of the concession; and then along the centre of the concession 34 chains 38 links to the south-west angle of his lot, being the limit between 29 and 30; and from thence to the place of beginning. The distance from the north-west angle of No. 30 to the south-west angle—the breadth of the defendant's lot—is 34 chains 38 links, instead of 30 chains,—being 4 chains 38 links more than the patent specifies; and this increase is accounted for by the fact of *the Adjala line being 4 chains*—and we are *compelled* to run to it—*farther* from the starting point between 29 and 30 in the front. By pursuing the courses contained in the patent, the whole of the ground on which the alleged trespass was committed is on the defendant's lot; and I am unable to discover that any other mode of survey would be either just to the defendant, or in conformity with original surveys or the views and intentions of the government. It appears in evidence that a surveyor of the name of Kelly had run the line from the limit between Lots No. 29 and 30 in the centre of the concession, and allowed to No. 30 the breadth of 30 chains; and that line was regarded at the time as establishing the boundary. By that line almost the whole of the land in dispute belongs to the defendant's lots; but some of the witnesses stated they thought some of the crop taken by defendant was outside that line, while defendant's son swore that the defendant was in possession of all the land from which any crop had been taken by him; and Davidson, who, under the defendant, had occupied and cleared part of the land, declared that his shanty was on Lot 30, according to Kelly's line, but very close to the line.

The plaintiff and defendant have been contending about the possession for some time, and when defendant sowed it the plaintiff sowed it over again, and when plaintiff attempted to put in a crop, defendant would put something else into the ground; so that in fact it was not clearly established by the evidence that the plaintiff had any exclusive possession of the ground from which any part of the crop was taken by the defendant. I am clearly of opinion that

Kelly had no right to such possession, and that the line run by him cannot be taken as establishing a correct boundary to the defendant's lot. I do not know on what principle or by what authority it can be held that the defendant's lot, having a greater breadth than its complement in front, shall be confined to its specific *limit of 30 chains* in the rear; nor can I imagine any sufficient reason why the survey should not be made according to the courses and distances specified in the patent. On these grounds, therefore, I am of opinion that the verdict for the defendant ought not to be disturbed.

RICHARDS, J.—The real difficulty in this case is to ascertain the north-western boundary of the east part of lot No. 30 in the 7th concession of the township of Albion—or, what is the same thing, the south-eastern limit of the allowance for road between lots No. 30 and 31, in or towards the rear of the said concession.

Lot No. 30 in the government patent is bounded as follows:—"Commencing where a post has been planted at the easterly angle of the said lot, then north forty-five degrees forty-five minutes west ten chains more or less, to the allowance for road on the northern boundary of the township; then south seventy-four degrees west thirty-five chains fifty links more or less, to the allowance for road between lots No. 30 and 31; then south 39 degrees 30 minutes west 1 chain 50 links more or less, to the centre of the said concession; then south 45 degrees 45 minutes east 30 chains more or less, to the southern limit of the said lot; then north 39 degrees 30 minutes east 33 chains $33\frac{1}{2}$ more or less to the place of beginning (containing 70 acres more or less)."

On referring to the original government plan of the township, a copy of which was proven, and in evidence at the trial, and comparing it with the description of the east part of lot No. 30 in the government patent, there can be no doubt that the north-western boundary of that lot is the allowance for road between lots No. 30 and 31, which then appears to be one continuous line parallel with the side line of the township from

the front to the rear of the concession. This concession is a double front concession, and it is found by actual survey that the side lines between lots being run from the posts at either end of the concession, half the length of the concession (according to sec. 27 of prov. stat. 12 vic. chap. 35) do not form a continuous line, but what is called a jog is caused at the centre of the concession.

Although this action is brought to recover damages for an alleged trespass committed on lot No. 31 in the 7th concession of Albion, yet the real object of the suit is, as I have before mentioned, to ascertain the north-western boundary of the east part of lot No. 30 in that concession; or, in other words, whether the *locus in quo* of the alleged trespass be on lot No. 30 or 31—it being concluded if it is not on 30 it must be on 31.

Lot No. 30 was patented, on the 12th October 1838, to John Bailey, under whom the defendant claims; and No. 31 was granted to the plaintiff on the 15th of August 1850.

Three modes have been suggested for determining the north-western boundary of the east part of lot No. 30, which I shall place in the following order:—

First.—According to Mr. Prösser's survey he commences at the south-east angle of the lot; then north-westerly to the allowance for road on the northern boundary of the township, usually called the Adjala road; then south 74 degrees west 35 chains 50 links; then south 39 degrees thirty minutes west 3 chains 31 links, to the centre of the concession. This last boundary he considers the south-eastern boundary of the allowance for road between lots Nos. 30 and 31 on the rear half of the lot.

Second.—According to J. S. Dennis' suggestion he would commence at the south-east angle of the lot. Then south-westerly on the division line between 29 and 30, to the centre of the concession; then north-westerly along the centre of the concession 30 chains (which is the width of a lot); then north-easterly parallel with the southern boundary of lot No. 30 to the Adjala road. This last boundary Mr. Dennis considers as the line of the allowance for road

between lots No. 30 and 31. Kelly's mode of ascertaining the allowance for road I understand to be nearly if not quite the same as Dennis.

Third.—According at R. Walsh's survey, he continues the allowance for road as ascertained by the posts planted at the front of the concession on the concession road between the 6th and 7th concessions through to the Adjala road, and declares it to be the true north-western boundary of the east part of lot No. 30.

The following facts I understand are either admitted or proved, and if properly established must have an important bearing on the decision of the question in dispute :—That according to the original survey of the township, and long before the patents for either No. 30 or 31 had been issued, an allowance for road was made between these lots ; that there is no difficulty in tracing this allowance for road from the original posts, which are now remaining or have been ascertained to have been planted in the front of the 7th concession ; that it is not pretended that there ever were any posts planted on the Adjala road in the original survey, shewing the allowance for road between lots Nos. 30 and 31 in the 7th concession, or in fact marking the limits of any of the broken lots where they touch on that road throughout the township, except that there are posts planted where the concession roads intersect the northern boundary of the township.

I do not think Mr. Prosser's mode of ascertaining the north-western boundary of the east part of lot No. 30 can be sustained on the proper application of any of the principles of law affecting surveys in this province. The description of lot No. 30 in the government patent evidently pre-supposes and calls for an allowance for road between lots Nos. 30 and 31 ; and as such an allowance was made in the original survey of the township, and long before the issue of the patent, it can surely be ascertained independent of and distinct from the patent. The boundary of the east half of lot No. 30 by the patent on the Adjala road, being 35 chains 50 links *more or less* to the allowance for road between lots Nos. 30 and 31, it may be urged that as

there is no post or boundary on that front (that is, the rear) of the concession to indicate such allowance for road there, it is therefore reasonable to suppose that in the original plan and survey the allowance for road was at the distance mentioned in the patent from the point of intersection of the rear line of the 7th concession with the Adjala road.

On referring, however, to the original plan, it appears clear that the patent harmonizes with it, and that the allowance for road between the lots is on the same line from the front to the rear of the concession, which would not be the case if Mr. Prosser's mode of determining the position of the road were adhered to. There cannot be any good grounds for supposing that the government intended in any way to alter or change the place or situation of the original allowance for road as laid down on the plan from the original survey. When, however, a new survey takes place the difference in the side lines of the lots in the front and rear half of the concession becomes apparent, and this difference causing the jog before alluded to, makes it necessary to settle the proper mode of determining where the allowance for road between lots Nos. 30 and 31 is situated on the east or rear half of the seventh concession.

The principle on which the prov. stat. 12 Vic. ch. 35, so far as relates to the mode of ascertaining in Upper Canada the boundaries between lots in the different surveyed concessions of townships, seems to me to be this :—To discover and recognize all posts and boundaries planted at the time of the original survey, and to give effect to such survey whenever it can be ascertained how it was actually made.

Looking then at the original map of the township, and taking into consideration the evidence in the cause, and the usual course pursued in making surveys at the time, we may, I think, safely come to the conclusion that in the original survey of the front of the 7th concession the surveyor commenced on the eastern limit of the township, and laid off lots and planted the necessary posts, marking such lots and the different allowances for roads between the lots as contemplated in the original scheme for laying out the township, and that when he came to lots Nos. 30 and 31 he

made and marked the proper road allowance between them. As this is a double front concession, he was probably instructed to plant posts on the rear of the lots, to correspond with those which might be planted in the front. This he appears to have done until he came to lot No. 30, and having placed a post between 29 and 30 he did not proceed along the Adjala road to ascertain where the allowance for road between 30 and 31 which he had made in the front of the concession would meet the northern boundary line of the township. If he had ascertained that point and planted the proper post, then all difficulty would have been avoided ; but having omitted to do so, can it be said that broken lot No. 30 has a double front, or that the east half of the lot has such a front along its entire north-westerly boundary ? I think not.

There can be little doubt that when the surveyor planted the posts on the rear of the 7th concession he intended they should be on a line with corresponding posts planted in front of the concession. Actual surveys recently made shew that, owing to want of care or skill in the original survey, this was not the case. The law, however, declares that in a double front concession, which this is, the posts in the front of the concession shall not be the points from which the side lines in the rear half of the concession shall be run, but that they shall be run from the posts planted at the rear of each lot. This undoubtedly, in most cases, would work less inconvenience than if the side lines were run from the posts planted in the front of the concession. The land being granted in half lots as divided by a line running through the centre of the concession, persons settling on the front and rear of the lots respectively would regulate themselves by the original posts which they found on the lots ; it would be a great hardship to them to shift the boundaries of their lots to cover errors in the survey after they had made improvements on the faith of and in accordance with original monuments.

Let us now endeavour to ascertain where the allowance for road is, between lots 30 and 31 east of the centre of 7th concession, and thence to the Adjala road. This road

allowance has existed since the survey of the township, and should be ascertained, in order to settle the boundaries of the lots adjacent to and bounded by it, without reference to the patent (in which it is mentioned as distant a certain number of chains and links, *more or less*, from a certain point on the northern limit of the township), and in the same manner, as if by the patent of 1838, the original location had been granted all the land in the rear half of the concession, from the division line of 29 and 30, to the Adjala road, reserving the allowance for road between lots Nos. 30 and 31. If this had been done, it would not for a moment be contended that such allowance for road was at a point distant 35 chains and 50 links south-westerly on the Adjala road from the place where the rear line of the 7th concession intersects the last mentioned road; and yet it appears to me that under the description in the patent you are as much bound to find the original allowance for road between lots 30 and 31 as you would be if the description had been as I have just supposed. I cannot therefore assent to Mr. Prosser's mode of ascertaining the northerly boundary of the east half of lot No. 30.

The second mode, that suggested by Mr. Dennis and adopted in Kelly's survey, if carried out, would give the due proportion of land to lot No. 30, and make it harmonize to a greater extent with the other lots in the rear of the concession; but he also fixes the allowance for road between 30 and 31 by an arbitrary rule, making it correspond with his idea as to where it should be, rather than considering it as a fact to be ascertained, and when to be acted on. If his mode of fixing the boundary were carried out, it is probable a portion of the land whereon the trespass is alleged to have been committed would be held to be the property of the plaintiff. I do not consider however that satisfactory reasons can be given for adopting Mr. Dennis' suggestion and Kelly's survey.

I feel that in this case it is exceedingly difficult to arrive at a satisfactory conclusion, but the weight of argument seems to me to be in favor of Walsh's survey, and of the views expressed by the Chief Justice. When the posts

were planted in the front of the 7th concession it was undoubtedly intended that the division lines between the lots should be run from these posts parallel with the side line of the township to the rear of the concession, and if no posts had been planted on the rear of the lots, the law declares that the lines should be so run—12 Vic. chap. 35 sec. 37. Where these posts are planted however, they then become the governing points from which the side lines of the lots are to be run for half the length of the concession; but as no post was planted on or near the rear or east half of the concession to point out the allowance for road between lots Nos. 30 and 31, or to shew the north-western boundary of lot No. 30, it appears that the only safe course will be to continue the allowance for road between 30 and 31 through from the front of the concession, where it has been clearly ascertained, parallel with the side line of the township to the Adjala road. I think this mode of settling the question accords with the general spirit of the statute 12 Vic. chap. 35, and can be relied upon as a more safe rule for fixing boundaries than uncertain distances in deeds or equitable modes of adjustment suggested by those who are anxious to settle difficulties.

It appears to me that the following dictum of Maule, Justice, in *Jones v. Chapman* (2 Ex. 821), settles the question of possession:—"If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two are in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

JAMES LITTLE V. HENRY J. INCE, ARCHIBALD GRANT, HANSE KENNEDY, WILLIAM S. FOX, WILLIAM EVANS, JAMES DANNIN, AND OTHERS.

Plaintiff was possessed of a mill-dam across a small stream, down which the defendants wished to float saw-logs, &c., but that there being no apron or slide to the dam, as required by the statute 12 Vic. c. 87, the defendants were unable to pass their logs, and therefore cut away a portion of the dam to enable them to do so.

Held, that as the defendants were entitled under the statute to use the stream for the purpose of passing logs, they were justified in cutting away a portion of the dam to enable them to do so, doing no unnecessary damage, and that there being no evidence of excess, the Court refused to set aside a verdict for defendants, on that ground.

Writ issued 17th January, 1853—Declaration 6th April, 1853.

TRESPASS.—First count stated that defendants on the 1st November, 1852, and on divers others days and times between that day and this suit, *vi et armis*, pulled up, cut, and tore in pieces, demolished and destroyed, damaged and spoiled a certain structure of plaintiff's, of great value, to wit, of &c., and with which, divers goods of plaintiff, to wit: 4000 saw-logs of great value, to wit, of &c., then floating upon certain water there, were secured and prevented from escaping, and being lost, &c., by reason whereof a portion of the said goods, to wit, 2000 of said logs, of &c., floated and were driven upon and against the shore, and certain shoals, flats, rocks, stones and banks there, and damaged and spoiled, &c., and the residue of said saw-logs were floated and driven to places to plaintiff unknown, &c., and lost to plaintiff, &c. Second count.—That defendants on 1st November, 1852, and on divers other days, &c., between that day and the commencement of this suit, *vi et armis*, broke, tore in pieces, cut in pieces, threw down, damaged and spoiled a certain dam of plaintiff's, of great value, to wit, &c., appurtenant to a certain saw-mill of the plaintiff's, situate, &c., and also on the said several days and times, *vi et armis*, seized and took the materials of the said dam of the plaintiff, to wit, fifty pieces of wood, &c., and them cast about, &c., and carried away the same, and converted and disposed thereof to their own use, by means of which dam of the plaintiff, the waters of

a certain creek called the Boston Creek were then dammed, forced back, and formed a mill-pond, appurtenant to the said messuage and saw-mill of the plaintiff, and also supplied a water-course leading from the said mill-pond to the said saw-mill, which said mill-dam and water-course then was used and employed by the plaintiff to supply the said saw-mill with the water required for working the same, &c., and to keep and retain certain saw-logs of plaintiff's, to wit, &c., of great value, to wit, &c., which plaintiff was then manufacturing, &c., and by means of the above trespasses, the plaintiff lost, and was deprived of the use, benefit, and enjoyment of his said dam, and the said materials thereof; and the said saw-logs escaped from the said pond and from the said water-course, and were floated and driven to a great distance, to wit, fifty miles, and were rendered of little value to plaintiff, and also the waters of the said small stream escaped and wholly left and abandoned the said mill-pond, whereby the same became of no use to plaintiff, and that the said saw-mill was thereby rendered useless for a long space of time, and plaintiff expended a large sum of money, to wit, &c., in repairing, &c.

Third count.—For that defendants on 1st November, 1852, and on divers other days between that day and suit, *vi et armis*, broke and entered a certain small water-course, (within which there flowed a certain small stream of water) of the plaintiff, situate in the township of Oneida, abutting on the west on certain lands in the occupation of one William Fagin, and on certain lands in the occupation of the plaintiff, &c., and on the day aforesaid, and on divers others days, broke down and demolished a certain dam of plaintiff's of great value, to wit, &c., by which plaintiff's saw-mill, of great value, to wit, &c., was supplied with water necessary for the said saw-mill, by means whereof the said saw-mill was deprived of said supply of water, and became wholly useless.

Fourth count.—For that defendants on the 1st November, 1852, and on divers other days, &c., between that day and this suit, *vi et armis*, broke and entered a certain several easement of plaintiff, in the water of a certain rivulet

called the Boston Creek, being between certain lands in the occupation of one William Fagin, and on certain other lands in the occupation of said William Fagin, to wit, the right of plaintiff, by means of a certain dam there, to have and continue the said water raised a certain height, to wit, &c., beyond the natural level, and to have and continue the same water spread over a portion of the land upon the margin thereof, which would not, in the natural course of the said rivulet, be touched thereby; and upon such water to float, keep, and continue the said logs of the plaintiff intended for the use of the said saw-mill; and then *vi et armis*, broke, &c., the said dam; and then, *vi et armis*, drove and forced away the water so raised as aforesaid; and then, *vi et armis*, seized and took divers, to wit: 5000 saw-logs of great value, to wit, of the value of £1000; and cast, pushed, &c., the same, and carried away the same, and converted and disposed thereof to their own use, and other wrongs did, to the plaintiff's damage of £500, and therefore he brings this suit.

Independently of the pleas involved in the demurrer (see vol. 3, p. 528), as to the six defendants above-named, the defendant Park pleaded not guilty alone, and issue. The above-named six defendants also pleaded: 1st, as to the first and second counts, that at the said several times when, &c., the said structure in the first count mentioned, and the said dam in the second count mentioned, were not, nor was either of them, the structure *and* dam of the plaintiff in manner and form alleged, to the country and issue.

Second.—As to the third count, that the said part of the said small water-course therein mentioned was not, &c., the water-course of plaintiff, as alleged &c.: to the country and issue.

Third.—As to the fourth count, that the said easement therein mentioned was not the easement of plaintiff, *modo et forma*, &c., and issue.

The 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th pleas, pleaded by these six defendants, are involved in the demurrer to pleas or replications. Thirteenth—To the whole declaration; not guilty, and issue.

Replication.—After demurring to the 4th and 5th pleas, which are both pleaded to the first count, the plaintiff new assigned that defendants, on the said several days and times in said first count mentioned, *vi et armis*, in a greater degree, and to a greater extent, and with more force and violence than was necessary for abating and removing the said supposed hindrance and obstruction in those pleas mentioned, and as therein mentioned, committed the said several trespasses in the introductory part of those pleas mentioned; *and also, vi et armis*, pulled up, cut in pieces, tore to pieces, broke, demolished, destroyed, damaged and spoiled the said structure of plaintiff on other and different occasions, and for other and different purposes, &c., and in other and different parts, out of that portion thereof which formed the said supposed hindrances and obstructions in those pleas mentioned, in manner and form as plaintiff hath above complained; which newly assigned trespasses are other trespasses than those in the pleas mentioned, &c.: verification. Plea to new assignment; not guilty, and issue.

The other six defendants not above-named, by a different attorney from the other seven, pleaded:

1st. To the whole declaration—not guilty, and issue.

2nd. To first count—not plaintiff's structure, and issue.

3rd. To first count—a navigable river and highway obstructed by the plaintiff's said structure, so that defendants could not pass therein, whereupon defendants, to remove the same, broke down the said structure, &c., and committed the trespasses in the first count mentioned, doing no unnecessary damage: verification. (a)

4th, To second count—said dam and materials not plaintiff's, and issue.

5th, To second count—similar to the third plea, justifying the breaking and pulling down the dam, and committing the trespasses, &c. (b)

(a) The plea does not allege any occasion for them to use the alleged public highway, at the times, when, &c.

(b) No occasion for doing so alleged.

6th. To the third count—not the water-course or dam of plaintiff &c., and issue.

7th. Similar to the third and fifth *supra*, except it adds that defendants, “*in order to navigate the said stream, &c.*,” justify entering the stream and breaking down the dam.

8th. To fourth count—said easement and dam not plaintiffs.

10th plea. To the whole declaration—the said structures, dams, water-courses, easements, saw-logs, and other goods and chattels in the declaration mentioned, not the property of plaintiff; and issue.

11th plea. To first count—that before the said time when &c., there was a stream flowing through the township of Oneida, through and along which all Her Majesty’s subjects could, did, and of right ought to pass during the spring, summer and autumn freshets, and float saw-logs and other timber, rafts and crafts, and that the said structure in the said first count mentioned was a mill-dam, &c., and constructed in and across the said stream, &c., without having therein any convenient apron, slide, &c., whereby saw-logs, &c., could pass &c., although plaintiff was requested to make such apron, slide, &c.; and that said defendants before, and at &c., after the statute, (12 Vic. ch. 87,) and during the autumn freshets of 1852, were bringing and floating saw-logs down the said stream lawfully, as they might, pursuant to the statute; and because the said structure obstructed the passage of the said defendant’s saw-logs, &c., not having any apron or slide, &c., the defendants did for removing said obstruction, and passing the said logs, pull down and remove a portion of the said structure to a convenient distance, doing no unnecessary injury thereto, which are the trespasses in the first count mentioned: verification.

12th. To second count—similar to the last.

13th. To third count—similar to the last.

14th. To fourth count—similar to the last, as to the creek or rivulet in the fourth count mentioned, &c.; and concluding, that said defendants did, to remove the said

obstruction and pass said logs, demolish and destroy a portion of the said dam, doing no unnecessary damage, &c.

Replications.—To 11th, 12th, and 13th, pleas—*de injuria* and issue.

To 14th, plea—That after the committing the trespasses therein mentioned and attempted to be justified, defendants broke, demolished, injured and destroyed, the several easements of plaintiff's, *modo et forma*, &c.: verification.

To 1st, 2nd, 4th, 6th, 8th, and 10th, pleas—traverse and issue.

To 3rd—Denies the highway as alleged; to the country. &c.

To 3rd and 11th pleas—new assignment, excess, and other occasions traversed.

To 5th—That after the pulling down, &c., defendants converted and disposed of the materials of the said dam to their own use: verification.

To 7th plea—After the trespasses justified, defendants broke down said dam in other parts, &c.

To 9th plea—After committing the trespasses justified, defendants broke, demolished, &c., the said several easements of plaintiff, *modo et forma*.

Rejoinder to replications to 3rd, 11th, 12th, and 13th pleas to the trespasses newly assigned—not guilty, and issue.

The issues of fact are:—

1st, Not guilty to the whole, by all the defendants.

2nd, Not plaintiff's property, by all but the defendant Park.

3rd, Not guilty to new assignment, to fourth and fifth pleas to sixth count, by the six defendants above-named. This disposes of seven defendants. As to the remaining six not named above.

4th, A navigable stream and public highway.

5th, Special justification under statute 12 Vic. ch. 87; sec. 5, 1st, 2nd and 3rd counts.

6th Not guilty to new assignment to 11th, 12th and 13th pleas. All the new assignments to all the four counts are traversed and put in issue.

At the trial, before Mr. Justice Burns, at the last Cayuga assizes, it appeared in evidence that a stream, called the Boston Creek, runs into M'Kenzie's Creek, and thence into the Grand River. That the plaintiff, at the time when, &c. was possessed of a mill and a dam across said stream, and a side boom to secure saw-logs in the pond, in the township of Oneida, about four miles from the mouth of the stream, which stream varied in width from 150 and 100 to 25 feet, and was about 50 feet where the dam was built : that there were a great many logs in the pond, on their way down, in charge of the defendants.

That there was no apron, gate or slide to such dam : that the stream at that part runs through private property, the land on both sides being owned by Fagin, but that the plaintiff was possessed of the mill and dam, &c.

That the effect of the dam was to cause back-water, and so facilitate the floating down saw-logs to the pond, but obstructing their further passage for want of an opening by which to pass over it.

That there was a top log on the dam spiked down : that the defendants being there with a large number of saw logs, and wishing to pass, about the first of December, 1852, cut the top log in two and pried off a part of it, which caused the water to escape over the dam, and the effect was that the rush of water and saw-logs carried away all the timber-work of the dam to the extent of forty feet, and the logs passed, but the water fell so rapidly that there was not water enough in the stream to float them—that is, afterwards on the same day ; and it was said that without the dam they could not have been floated down so far.

It also appeared that saw-logs of the plaintiff's escaped and passed down below the dam by reason of the aperture made by the defendants. There was more or less evidence against all the defendants.

On the defence, evidence was given to the effect that saw-logs had been floated down the Boston Creek from points higher up than the plaintiff's dam, for twenty years before ; that the dam was erected by Fagin in 1848, at a place where the stream is fifty feet wide, and had been

raised by plaintiff during the summer of 1852, by placing the log upon it : that the waters run all the year round, but are low in summer : that in December, 1852, there was a freshet and the water up, but subsiding, and the log on top of the dam, which raised it about eighteen inches, prevented logs passing over until abatèd ; also, that plaintiff, being requested, refused to obviate the difficulty experienced.

In reply, evidence was given by plaintiff, that Fagin had originally made an apron to the dam, which was carried away by the stream, when logs passed over as well without it, but that during the summer before, the plaintiff put the top log on as a protection to prevent his own logs escaping : that Fagin was the proprietor, but the plaintiff was in possession and that the apron was away before he got the mill, &c.

The learned judge told the jury, that the plaintiff had a right to the dam across the stream, and that the defendants had no legal right to tear it down.

That subject to the plaintiff's right the defendants had a right to use the stream for the purpose of conveying their saw-logs down it, under 12 Vic. ch. 87, sec. 5 ; doing no unnecessary damage to the plaintiff.

That the dam had no apron, &c. : that the act requires parties to put in conveniencies for passing saw-logs : that there was evidence that saw-logs could be got over this dam before the plaintiff altered it, and the effect of the alteration was to prevent its being longer done : that the plaintiff was asked to provide the convenience needed, and he refused to do it or to permit to it be done, so far as the log on the top of the dam was concerned.

That the effect of the two rights, as stated, would be that the dam having no apron, &c., the statute conferred upon the defendants the right to do what was necessary to get their logs down, doing no unnecessary damage to the plaintiff ; wherefore the question was, whether they did more than was necessary.

That if the top log and boards could have been removed without injuring the remainder, then they should have confined their operations to that, but that if the construction of

that portion so rendered it part of the whole, as to cause the whole to go, then it would be necessary to remove the whole; and was it so? That if the top log could be removed without injuring the whole dam, then there seemed to have been excess; if not, the defendants were justified under the act: that the question therefore was, whether excess had been committed or not.

The defendants' counsel contended in his address to the jury, that if the defendants had a legal right to remove the top log, and the water carried away the rest of the dam, the action should have been case, not trespass: this was overruled, as there was evidence that the defendant's pried at other logs and part of the dam, and the dam going seemed to be the effect of what they had done, and not of the water, independent thereof.

The jury were told it was competent to them to find all or any of the defendants guilty.

The plaintiff's counsel objected to the charge, contending that the statute does not apply to property which may be private property, through which a stream may run; also, that the freshet spoken of by the witnesses was not proved to be an autumn freshet within the meaning of the act.

The jury found a general verdict for the defendants. Applied to the several issues, the evidence shewed:—

1st, That the defendants were all guilty, unless Park be excepted.

2nd, That the *locus in quo* was plaintiff's, &c.

3rd, That the stream was not a navigable water or highway.

4th, That the defendants did not convert to their own use, &c.

5th, Reducing the case to the legal question, whether, being a private stream, the defendants could justify abating the nuisance therein; and if so, then, secondly, to the question of law and fact, whether in so doing they committed any excess—that is, the six defendants above-named, as to the first count, and the other six defendants not above-named as to all or any of the four counts.

As to the defendant Park, his defence rests under the general issue only.

In Easter term last, *Martin*, for plaintiff, obtained a rule on the defendants to shew cause why the verdict should not be set aside, and a new trial had between the parties, or some of them, on the grounds :

1st, Of misdirection, and because the learned judge neglected and refused to direct the jury as to the law affecting the several issues joined.

2nd, That the verdict was perverse.

3rd, And contrary to law and evidence, and the judge's charge.

4th, And contrary to the weight of evidence.

Freeman shewed cause during the same term for the six defendants above-named, and the defendant Park.

1st, As to the defendant Park, he submitted there was not sufficient evidence against him; at all events that he had denied the guilt, and it being left to the jury, they have acquitted him ; and that although saw-logs of his passed down, there was no proof that any of his workmen were there.

2nd, As to the other six defendants, that the jury had acquitted them, and having done so, a new trial on this issue alone should not be granted against any but the owners of the logs, and the employers of the laborers, or such as were proved to have been actually engaged in breaking the dam.

3rd, That there was no misdirection—that the pleas of the six defendants not named above raised the question of justification, which if established and limited to them separately, would have reduced the plaintiff's claim as against Park and the other six to nominal damages only.

That if unsuccessful on demurrer, the pleas of the latter might be amended ; and if not, the facts of the case did not call for a new trial when there could be no substantial damages recovered.

That as to the excess, none was proved, it not being shown that anything was done by the six defendants above-named more than their pleas covered ; and if it had been, that the

remedy would be case for negligence, and not trespass, *ab initio* or *quoad* such excess: that if the justification of the other six stands, there could be no object in a new trial as to his clients.

That the issues to be tried opened the whole merits of the case to the jury, and their opinion may operate in favor of all, having found for all as they did; and that the granting a new trial was discretionary.—*Elliot v. Crocker* (8 U. C. Q. B. R. 154-6), 4 D. & L. 117; 11 Ju. 64; 12 Ju. 770.

Cameron, Q. C., shewed cause for the other six defendants. He objected that the replications to the third, eleventh, and other pleas were double and inconsistent, one part denying and another admitting and replying thereto, &c.

That if limited to the issue of excess, the main act must be justified; and if so, there was no pretence for a new trial merely on the ground of the alleged excess, and none was in fact proved.

He further remarked that the defendants would be entitled to judgment *non obstante*, even if these issues were found against them.

Martin, in reply, contended:—

1st, That the learned judge in charging the jury did not distinguish the issues as raised by the defendants, who pleaded apart from the others, but left the case to the jury on the whole record; as if the special pleas of justification and the questions of excess applied to all, instead of six only of the defendants; whereas, as to one, the only plea was not guilty, and as to the six others not guilty, and not possessed, and that herein is misdirection or omission to direct, which is the same thing; because, had the issues been correctly applied, although the six defendants not above-named might have succeeded on the special issues raised by them, the plaintiff might have succeeded against the other seven, who in effect had the benefit of pleas and issues in which they were not parties.

2nd, As to the six defendants not above-named; that the replications are not double; and if they were, it is no cause against this rule, as the defendants should have moved to

strike them out, &c.; Scott v. Watson (1 C. B. 827), Folson v. Bishop of Carlisle (12 Ju. 438).

That there is no incongruity, the replications only traversing the pleas so far as they go, and then replying or new assigning additional matter that the declaration includes, and which shews these defendants to have been trespassers *ab initio*.

That trespass lies for an easement as a fishery, rabbit warren, &c., and if not, that the declaration shews that the easement meant was a dam, and the right to maintain it across the stream in which, &c.

3rd, That the stream is not within the statute at all, and therefore defendants were trespassers in law; that the statutes do not apply to such a stream as this; that there was no proof of an autumn freshet, such as the statutes contemplate, and the occasion not a justifiable one, and was in the month of December, in the winter, and not in the autumn; consequently that the special pleas of these defendants were not proved.

4th, That there was clear proof of excess, there being no necessity for the defendants destroying the plaintiff's dam as they did; and that, if justified so far as necessary to pass the saw-logs, it behoved them so to exercise the right as to prevent any further injury to the plaintiff, which they had not done, and so carelessly conducted themselves in the premises that they were trespassers *ab initio*, at all events for the excess proved.

5th, But that no such right existed; that the statute in conferring a right prescribed the remedy; that not being a common law right, but an infringement upon the plaintiff by virtue of the statute, no summary remedy as at common law would arise, justifying the breaking of the dam to abate a nuisance, not being conferred by the act, nor accruing at common law.

6th, He urged that without the dam, and in the actual flow, &c., of the stream, the logs could not have reached it and therefore it is not a case within the act, as the result proved; that the plaintiff's witnesses were uncontradicted,

the defendants persons who were not present; and that, as to many of the issues the verdict was plainly incorrect.

7th, That contingent damages should have been assessed, and each defendant's case disposed of separately; on the foregoing points, he cited *Jones v. Bird* (5 B. & A. 844), *Greenslade v. Halliday* (6 Bing, 379), (9 Bing, 193), *Smith v. Bell* (10 M. & W. 378, 15 Q. B. 283, 16 Q. B. 68); *Holts' Rep.* as to excess. Not a navigable river—4 B. & C., *Outram v. Morewood* (3 T. R. 359,) *Courtall v. Thomas* (3 B. & A. 293), *White v. Laing* (2 U. C. C. P. R. 187), *Blake v. White* (10 U. C. Q. B. R. 181); as to new assigning, see *West v. Nibbs* (4 C. B. 172.)

MACAULAY, C. J.—The observations made on the various demurrers dispose of some of the points raised on this rule.

1st. I think there was evidence to go to the jury against all the defendants, though more pointed as against some than others, and that upon this issue the plaintiff was entitled to a verdict against all but Park, upon the pleas of not guilty to the first count.

2nd. The plaintiff was entitled to a verdict on the pleas of not his property, &c., on the pleas to the first count.

3rd. That the stream was not proved to be a navigable one and a public highway, and that therefore the plaintiff was entitled to a verdict upon the third plea to the first count by the six defendants not named above.

4th. That the stream was within the statute, and those defendants entitled to a verdict upon the eleventh, twelfth, and thirteenth pleas to the first, second and third counts respectively.

5th. That there was no conversion or excess proved against the six defendants not named above, as to the second, third, and fourth counts; and they are therefore entitled to a verdict on the pleas to the new assignments to the fifth plea to the second, seventh plea to the third, ninth plea to the fourth, and fourteenth plea to the fourth count.

6th. The only remaining consideration is, how the rule should be disposed of upon the issues of excess which relate to the first count.

There was evidence of such excess for the jury, but on

these issues, the *onus* of proving such excess was upon the plaintiff, and he failed to convince the jury thereof.

The following cases relate to the nature of the proof required in support of such excess:—Hockliss v. Mitchall (4 Esp. 86), Sadgrove v. Kirby (6 T. R. 483), Potter v. North (1 Sand. 353, and notes), Beyfield v. Porter (13 East 203), Pickering v. Rudd (1 Star N. P. C. 56), Arlett v. Ellis (7 B. & C. 346, S. C. 9 D. & R. 897), Greenslade v. Halliday (6 Bing. 379), Davies v. Williams (15 Ju. 752, 5 Eng. R. 269).

It appears to me that if the defendants were justified in removing the plaintiff's dam, so far as it operated as a nuisance to them, as we have just held, they were bound to exercise that right without adding any unnecessary injury, and so to pass the saw-logs over the dam as to avoid any damage to the dam that prudent and careful management might prevent; but that if they did no more than was necessary, and were not reckless or negligent, and used due diligence in the premises, and that damage to the dam exceeding what they actually did or what was indispensably necessary ensued, caused by the friction and pressure of the water and logs in passing the dam (the latter being so passed with due care), that the defendants would not be responsible for such injuries.—Wigford v. Gill (Cro. El. 269), Rex v. Pappineau (2 Stra. 687-8), Greenslade v. Halliday (6 Bing. 379), Perry v. Fitzhowe, (8 Q. B. 757—ib., 775, 5 Co. Rep. 100, 1 W. J. 221-2), Glegg v. Dearden (12 Q. B. 576), Davies v. Williams (15 Ju. 752, 5 Eng. Rep. 269).

As to the six defendants named above, the new assignment of excess is to their fourth and fifth pleas, all of which are pleaded to the first count; and as to the six other defendants the new assignment of excess is to their third and eleventh pleas, both of which are pleaded to the first count, and to the whole the pleas are not guilty and issues. Consequently the issues of excess arise under the first count, and apply to all the defendants except Park—that is, to twelve of them.

The replications demurred to, upon which plaintiff has

judgment against the six defendants above named, are to the sixth and seventh pleas to the second count, which replications allege a conversion of the materials, &c., to their own use, and the replications to the eighth, ninth, and tenth pleas to the fourth count, which replications allege additional acts of trespass beyond those covered by the pleas, in effect excess.

As to all those the plaintiff is entitled to judgment on demurrer against the six defendants above named, with whatever consequences legally follow.

There being only one transaction in fact which is embraced by the first count, and no conversion of materials proved as alleged, as shewn by the evidence and verdict in relation to the issue raised under the replications to the fifth plea of the other six defendants not named above to the second count, nor any such additional acts of trespass unless *excess*, as replied to their third and eleventh pleas to the first count, as appears by the evidence and verdict upon the replication to their seventh and ninth pleas, the seventh plea (*quære*) to the first and second counts, and the ninth plea to the fourth count, the plaintiff would only be entitled to nominal damages; because, if he claims and could recover substantial damages, it is probable the other six defendants would apply for and obtain leave to withdraw the demurrer and take issue upon the plaintiff's replications, when the result might be in their favour, if the plaintiff failed to prove such *conversion* or such *additional trespasses* as he has alleged by way of replications, &c. Besides these, defendants have pleaded not guilty to all the counts, and upon that issue the verdict is in their favour, and rightly, so far as respects the second and fourth counts; and also the third, because the evidence relates only to one transaction, which is embraced by the first count; consequently the defendants are entitled to judgment on the whole record as to these counts, although the plaintiff is entitled to judgment upon the issues in law raised by the demurrer to his replications as to the second and fourth counts.

Under such circumstances it is not of any use nor usual to assess damages at all. It is reduced to the mere point

of costs—see *Carruthers v. West* (12 Ju. 980). That even if doubtful, the plaintiff must take such course as he may be advised—*Price v Reid* (6 M. & G. 1), and cases cited, *ib.* *Wilmshurst v. Bowker* (7 M. & G. 892, 4 D. & L. 462, 9 Dow. 967), *Tinkler v. Rowland* (4 A. & E. 868), *Cameron's Rules* 29, 30, 31, and notes, *ib.* 135, stat. 7 W. 4 ch. 3 sec. 26, Reg. Gen. H. 13 Vic. No. 30, page 10 of our printed rules.

The evidence of excess in relation to the first count was to the following effect:—That the dam was formerly built of logs, &c., and had once an apron, &c., which was carried away before the *locus in quo* came into the plaintiff's possession, and that he afterwards placed the top log on the dam, which raised it eighteen inches, and also placed a board sheathing spiked thereto, and against which, as I understand it, earth had been thrown, which pressed them down and rendered the dam tighter, and that the weight of the earth kept the top or temporary log down, and that bolts were put in on the under side of this log, which kept it in its place, or (as expressed by some of the witnesses) that it was spiked on or bolted down. That on or about the 1st December, 1852, the defendants were seen prying up this top log, saying they intended to tear down the dam; that it was cut in two and taken off or displaced, upon which the force of the water, with the logs coming against the dam, the bottom started, and the timber part of the dam was carried away to the extent of 40 feet.

That when one part of the top log that had been cut was pried off, the force of the water carried away the remainder, and the logs came so fast, that they, the defendants, pried the two logs of the dam round, and then it swung round, and the rush of the water and logs forced a passage through. One witness said that the top log of the dam could have been cut through and a portion removed without injuring the remainder of the dam; but the witness who said this was not sure whether they had pried round one or two logs; he also said it was the rush of the water that enabled the saw-logs to go over the dam; that if the dam had not been there the logs could not have

been floated down the stream, and that when the water fell that afternoon there was not water enough in the stream to float the logs.

On the subject of a freshet, and the quantity or state of the waters, there was however other evidence.

It is not very clear whether the witnesses called to prove excess meant to say the defendants had pried up or forced off other logs of the dam than the top one, or merely that they cut it in two and first pried off one part of it and then the other; nor is it stated with clearness whether it was necessary or not necessary to do more than sever and cast off the top log to admit of the passage of the saw-logs; and the removal of more or less of the board sheathing might have been equally necessary, or even one or more of the under logs of the dam. It is said that the saw-logs came so fast that they (defendants) pried the two logs of the dam round; but whether this means two pieces of the top log or two separate and distinct logs was not clearly made out, nor does the evidence shew that the saw-logs spoken of as coming so fast arose from negligence or wilful mismanagement on the part of the defendants, and the whole evidence was left to the jury expressly on the question of excess.

Having carefully considered this evidence, and referred to the learned judge who tried the cause, we have come to the conclusion that assuming the defendants to have been legally entitled to reduce the dam to a sufficient extent to admit of the passage of the saw-logs over it in the then state of the waters, the evidence of excess (through any acts by them positively committed or in their carelessly, or in excessive numbers or otherwise, negligently or wilfully passing the logs or permitting them to pass to the injury of the plaintiff's dam) was not sufficient to entitle us to set aside the verdict, and grant a new trial, which could not be on other terms than payment of costs. There is no evidence that logs were passed or suffered to pass with undue rapidity or in too great numbers at one and the same time, and the prying off the logs under the top log, and the removal of the sheathing, so far as accomplished by the defendants, seems to have been indispensable to admit of

the logs passing at all, and if the dam has suffered materially in addition thereto by reason of the force and friction of the water and saw-logs, it seems a material or inevitable consequence of the exercise of the defendants' right, and which might have been prevented had the plaintiff made the dam in conformity with the statute, and we do not think that any such excess is proved to be justly attributed to wanton, reckless, or wilful conduct on the part of the defendants such as to render them responsible therefor as trespassers guilty of excess.

On the whole therefore, we think the rule for setting aside the verdict should be discharged upon condition that the defendants consent to the verdict being modified so as to be entered for the plaintiff against all the defendants except Park upon the pleas of not guilty and not possessed, and not plaintiff's property, to the first count, and upon the third plea of the six defendants not above-named to the first count.

The effect upon the whole case is, that excepting Park the plaintiff is entitled to a verdict on the first and second issues of fact to the first count, as to the six defendants above-named. As to the six defendants not named above, to the first, second, and third issues of fact raised by them, being the issues of not guilty, not possessed, and a public navigable river, and to judgment on all the demurrers, except as to the fourth and fifth pleas to the first count, and the eighth and ninth pleas to the third count, as to which the six defendants above named are entitled to judgment.

That the defendant Park is entitled to retain the verdict on the plea of not guilty to the whole declaration.

The six defendants above named retain the verdict to the new assignment of excess to the fourth and fifth pleas to the first count; and that the six defendants not named above are entitled to judgment on the eleventh, twelfth and thirteenth pleas to the first, second and third counts, and upon the pleas to the new assignments to the third and eleventh pleas to the first count; to the fifth plea to the second count; to the seventh plea to third count; to the

ninth plea to the fourth count; and the fourteenth plea to the fourth count.

That the twelve defendants are entitled to retain the verdict upon the pleas of not guilty and not possessed to the second, third and fourth counts by them respectively pleaded.

McLEAN, J., and RICHARDS, J., concurred.

CONNELL AND SON V. OWEN.

Surviving partner—Apprentice.

A surviving partner is bound by the covenant of himself and his deceased partner to teach an apprentice the business, &c., until the end of the term for which he was apprenticed.

Writ issued the 7th of April, 1853; declaration the 6th of August, 1853.

COVENANT.—For that whereas, heretofore, to wit, on the first of December, 1848, defendant and Thomas Mills, who died before the commencement of this suit, carried on business as co-partners in the trade or business of coach builders, &c., and thereupon by a certain indenture, made the first of December, 1848, between plaintiffs of the one part, and the defendant and said Thomas Mills (since deceased) of the other part, sealed with the seals of the plaintiffs and the defendant and said Thomas Mills respectively, the date whereof is the day and year aforesaid, and which said indenture the plaintiffs now bring into court; the said Richard Connell the younger, of his own free will, and by and with the consent of the said Richard Connell his father, testified by his becoming a party to the said indenture, did put, place, and bind himself apprentice to said defendant and said Thomas Mills, to be taught and instructed in the trade and business of a coach-smith from the first day of December, 1848, until the full end and term of five years; and during which term it was thereby by the said Richard Connell the younger covenanted, promised and agreed, that he would and should, during all the said term of five years, well and truly serve said defendant and said Thomas Mills as an apprentice in the trade and business of

a coach-smith, doing no damage or injury to his said masters, &c.; and defendant and said Thomas Mills d.d by said indenture covenant, &c., with the said Richard Connell the younger, that they, the defendant and said Thomas Mills, according to the best of their power, skill and knowledge, should and would, during the term of five years, teach and instruct, or cause to be taught and instructed, the said Richard Connell the younger in the trade or business of a coach-smith, and should pay him certain sums weekly during his apprenticeship, and that all the parties to the said indenture did covenant. &c., each party unto the other respectively, that each of said parties should truly and faithfully perform all the covenants, &c., on the part of each respectively to be performed, &c.; and that each party making default should pay to the other the sum of £50; and that, forthwith, after the making of the said indenture, the said Richard Connell the younger entered and was received into the service of the said defendant and the said Thomas Mills, to serve them as such apprentice as aforesaid, during the said term of five years, according to the said indenture, and continue well and faithfully observing and performing all the covenants in said indenture on his part until said Mills died, and afterwards, and from thence until his discharge, continued in the service and employment of said defendant as such apprentice until the first of January, 1851, and was then ready and willing, &c.; nevertheless, the defendant on the day and year last aforesaid wholly discharged said Richard Connell the younger, and then refused any longer to teach and instruct him in the said trade or business of a coach-smith, although requested so to do.

And the plaintiffs in fact say that, although the defendant as such surviving partner hath so as aforesaid broken the said covenant of the said defendant and said Thomas Mills, as aforesaid, with Richard Connell the younger, and wholly refused to perform the same, he, said defendant, did not nor would, either at the time of said breach of said covenant with said Richard Connell the younger, or at any time since, pay unto the said plaintiffs the said sum of £50, so

as aforesaid by him and said Mills covenanted to be paid on any breach, &c., but to pay the same hath refused, and still doth refuse, to plaintiffs' damage of £50, and therefore they bring suit, &c.

Pleas.—1st. After setting out the indenture on oyer, *non est factum*.

2nd. That the said Richard Connell the younger after the making of the said indenture, and after the death of the said Thomas Mills, and before the time of the said supposed dismissal and discharge, to wit, on &c., did voluntarily, and of his own free will, leave, quit, and depart from the service of defendant, and hath remained &c., so absent from thence hitherto; without this, that he the said defendant dismissed and discharged the said Richard Connell the younger from his employment and service, and refused to teach and instruct, or cause to be taught or instructed the said Richard Connell the younger in the trade or business of a coach-smith, *modo et forma* alleged; concluding to the country.

3rd. That said Richard Connell the younger, after the making of said indenture, and after the decease of said Mills, and before said supposed dismissal, &c., to wit, on &c., voluntarily and of his own free will, and by and with the consent and approbation of the said Richard Connell his father, leave, quit, and absent himself from the service and employment, and with the like consent of his father remained, and continued absent from thence hitherto; without this, that the defendant dismissed and discharged the said Richard Connell the younger from his employment and service, and refused to teach, or cause to be taught, the said Richard Connell, *modo et forma* alleged; concluding to the country, &c.

4th. That the said Richard Connell the younger, after the making of said indenture, and after the decease of said Mills, and before the time of the said supposed dismissal and discharge, to wit, on, &c., did voluntarily and of his own free will, leave, quit, and depart from the service of defendant, and hath remained, &c., so absent from thence hitherto; concluding with a verification.

5th. That the said Richard Connell the younger, after the time of making of the said indenture, was and is an infant, and that after the making of the said indenture, and after the decease of Mills, and before the said dismissal, &c., and before suit, to wit, &c., it was mutually agreed by and between the said now plaintiffs and the defendant, that neither the said Richard Connell the younger should thereafter remain and continue to serve the said defendants as such apprentice at the trade or business of a coach-smith until the end of the said term of five years, nor should he the defendant any longer teach and instruct, or cause to be taught and instructed, the said Richard Connell the younger in the said trade or business, &c., and that the said Richard Connell the younger should then, on his part, be discharged of and from remaining and continuing to serve the said defendant as such apprentice for the residue of the said five years, under the said indenture, and that the said defendant should then, also, on his part, be discharged from teaching the said Richard Connell the younger in the said trade, &c., under the said indenture; and the said Richard Connell the younger, and the said defendant were thereupon respectively discharged of and from performing of the said indenture on the respective parts of the said Richard Connell the younger, and performance of the said indenture was then accordingly, by and between the said plaintiff and the said defendant, waived and abandoned; concluding with a verification.

Demurrer to all the pleas, on the grounds: As to the first plea—that it does not traverse any fact alleged in the declaration; that it does not traverse any allegation of the plaintiffs in the terms used by the plaintiffs.

As to the second plea—that the inducement to the traverse tendered by the said plea contains matter in confession and avoidance, and cannot be properly made inducement.

2nd. That the traverse tendered by the said plea is double, as putting in issue the discharge of the said Richard Connell the younger by the defendant, and also the refusal of the defendant to instruct him.

3rd. That said inducement is an attempt to allege new matter without giving the plaintiffs an opportunity of answering it.

4th. That the said inducement is not inconsistent with any allegation of the plaintiffs.

As to the third plea—same as to the second plea.

As to the fourth plea—that although said plea states that it was before his dismissal said Richard Connell the younger absented himself, it is not shewed that it was before the defendant refused to instruct him.

2nd. That it is not stated that the said Richard Connell the younger refused to continue in said employment of defendant, or that he absented himself without defendant's consent.

3rd. That it does not shew any willingness on the part of the defendant to instruct, &c., the said Richard Connell the younger.

4th. That notwithstanding anything contained in that plea, it appears in said plea it is possible defendant may have wholly broken his covenant.

5th. That it is uncertain, and does not point out to what breach it alludes.

As to the fifth plea—that it is double, and attempts to set up matter of abatement and matter supposed to be in bar.

2nd. That it attempts to set up a parol agreement as dispensing with a covenant under seal.

3rd. That it neither traverses or avoids any allegation of the plaintiffs.

Hallinan, in support of the demurrer to the declaration, referred to Harrison & Matthews, 10 M. & W. 768, 772, Hobart 134; to shew the declaration correctly framed in covenant.

As to the demurer to the pleas:—

1st. That the plea of not his deed did not traverse the allegation, that it was the joint deed of defendant and Mills, deceased, *modo et forma*.

2nd. That the inducement to the second plea was bad, *Tanner v. Smart*, 6 B. & C. 608; *Chitty's Forms*, Smith

v. Lovell, 10 C. B. 6; Faulkner v. Johnson, 11 M. & W. 581; Pearson v. Rogers, 9 A. & E. 303.

That the traverse is also bad, and the whole plea bad, as in one part excusing the not teaching, and in another denying the discharge; concluding to the country, and so precluding the plaintiff from answering the excuse alleged &c.

That the third plea was in effect the same.

That the fourth, although it concludes with a verification, is bad for the causes assigned, and for not alleging willingness to teach the son, or that he departed without consent.—Adams v. Wright, 1 M. & W. 364; and Capner v. Mincher, 13 M. & W. 704; as to parol waiver. He also referred to 15 Ju. 451, 20 L. J. Ex. 241, 4 Eng. R. 419, Lloyd v. Blackburn, 9 M. & W. 363; 1 Daw. N. S. 646.

A. Crooks, for the defendant, contended—

That the declaration was bad, on the ground that the covenant to teach was of that nature, that the death of Mills put an end to it; citing Chitty on Contracts, p. 96, Ed. of 1850; Rex v. Peck, 1 Sal. 66; Baxter vs. Burfield, 2 Stra. 1267; Siboni v. Kirkman, 1 M & W. 418, 413; Reg. v. Inhabitants of St. Martin's, Exeter, 2 A. & E. 659; Ellen v. Top, 15 Ju. 451.

That the son, an infant, was not bound to serve defendant alone, and so the obligation not reciprocal. The other objections to the declaration he abandoned.

As to the pleas: That the first was good, according to City Bank v. Kellar, 2 U. C. C. P. R. 508.

That the second and third were also good.—Stephens on Pldg. 168-9, 178, 183, 188.

That the son was not bound *ab initio*, and might depart at any time.—McPherson on Infants, 479, 680; Chy Ju. Forms 491. 2nd edition; 3 Chitty's Precedents 236, 7th edition; 3 Went. 416, 428, 429.

That the fourth plea was not objected to as an argumentative denial, and was otherwise good, referring to the causes assigned.

5th. As to the fifth plea—that the defendant might be discharged by parol—Rex v. Inhabitants of Harberton, 1 T.

R. 139; *Rex v. Inhabitants of Mountsorrel*, 3 M. & S. 384; *The King v. Inhabitants of Great Wigston*, 3 B. & C. 484; 17 L. J. Mag. Ca. 181; *Chitty on Contracts* 107, 384; 1 *Smith's Ldg. Ca.* 154; 3 *Went.* 422; *Ex parte Gill*, 7 East 376; *Grey v. Cookson*, 16 East 13; *Gee v. Filton*, 4 Taunt. 876; *Ex parte Davis*, 5 T. R. 715; *Branch v. Ewington*, 2 Doug. 518; *East v. Pell*, 4 M. & W. 665; *Wood v. Fenwick*, 10 M. & W. 204; *Cumming v. Hill*, 3 B. & A. 59.

That if the infant might go or stay; and if he elected to go, the covenant to teach was conditional, revocable, and so put an end to.

Hallinan, in reply, submitted that, however an executor could not teach a son, &c., it was no reason why a joint contractor surviving could not—See 19 L. J. C. P. 246; *Foster v. Crabbe*, 16 Ju. 836; 14 Eng. R. 374; S. C. 10 C. B. 6; *Lush v. Russell*, 5 Ex. R. 203.

MACAULAY, C. J.—The case of *Rex v. Pick*, or rather the dictum of *Eyre J.*, that covenant would lie against the executor, and *Walker v. Hull* (1 Lev. 177), are said to have been overruled in *Baxter v. Burfield* (2 Stra. 1267) *Williams' Executors*, 1061, 1082, 527; *Hughes v. Humphreys* (6 B. & C. 680).

Upon a consideration of the cases, (which are principally by or against executors, and not surviving partners), including *Lloyd v. Blackburn* (9 M. & W. 363), and the *King v. Inhabitants of St. Martin's, Exeter* (2 A. & E. 655, 659), *Ellen v. Top* (15 Ju. 421), I cannot adopt the conclusion that the death of Mills put an end to the covenants on defendant's part to teach the plaintiff, Richard Connell junior, until the expiration of the five years, or to make him the weekly payments agreed upon, so long as he was willing to serve the surviving partner, as he alleged he was.

I am disposed, therefore, to think the declaration good so far as respects the defendant's continued liability to perform the covenants on his part after the death of Mills,

and no other objection thereto was made upon the argument of this demurrer.

The covenant to serve on the one hand and to teach on the other was no doubt with the defendant and Mills jointly, and no express provision is made in the indenture for the contingency that has occurred ; still that event was the act of God, and rendered a continued service with, and a continued trading by both jointly impossible.

But I see no good reason why the dissolution of the partnership by the death of Mills should relieve the defendant from the continued obligation to teach the trade which he and his deceased partner had covenanted to teach; nor am I satisfied that the plaintiff Connell junior was not bound to serve the defendant, as survivor of the two partners. If the defendant continued the business, I see no reason why the one should not trade and pay wages, and the other serve and earn them, as agreed upon.

As respects the mere covenant to pay wages, it would clearly survive, and as analogous to cases of covenants to find meat and lodging to apprentices for a period, during which the master died, and the executors have been held responsible. But here no breach is assigned in relation to the weekly wages.

I look upon the present as a stronger case. The declaration alleges that after the death of Mills he covenanted to serve the defendant for a year, and that the defendant then discharged him, &c. The declaration does not state, nor does the indenture show, whether the plaintiff Connell junior was a minor or of full age at the date of the indenture, and he does not sue by *prochien ami* as an infant now, nor can it be presumed that he was a minor when the parties respectively executed the indenture.

2nd. As to the first plea, I think it good, and governed by the case cited of the City Bank v. Kellar (2 U. C. C. P. R. 508).

The plaintiffs in the declaration allege that by an indenture, &c., sealed with the seals of the plaintiffs and the defendant and said Mills respectively, &c., of which profert is made, the defendant craves oyer, and sets out the indenture in

hæc verba, concluding—"In witness whereof the parties to these presents have hereunto set their hands and seals," followed by the four names, the first of which is the defendant's, with an L. S. to indicate the place of the seal; and then he for plea saith it (which relates to and means the said indenture) is not his deed. The sealing is not alleged to have been a joint act of the defendant and Mills, but of each respectively; and the plea seems to me a sufficient traverse, and not too narrow. It does traverse a fact alleged in the declaration, and in terms sufficient.—*Middleton v. Sandford* (4 Cowp. 34), *South v. Tanner* (2 Taunt. 254), 1 Sand. 291.

The extent of proof required to rebut, or the evidence admissible in support of such a plea, is not here the question.—*Wilson v. Woolfryes* (6 M. & S. 341, 2 W. B. 1152-3), *Cardwell v. Lucas* (2 M. & W. 117, 2 Sand. 417), *Bird v. Holman* (9 M. & W. 761).

3rd. As to the second and third pleas, the doctrine of special traverse is explained in *Stephens on Pldg*, 193 to 217, 5 Edn. At p. 217 he says,—“If it be faulty, as not containing a sufficient answer in substance—that is, an argumentative denial—or in giving an answer by way of direct denial or by way of confession and avoidance, the opposite party may demur to the whole traverse, though the *absque hoc* be good, for this insufficiency in the inducement;” so, also, in *Foster v. Crabbe* (16 Ju. 836), *Jarvis, C. J.*, said, “The plaintiff may by it (a special traverse) present a traverse on which an issue in fact may be taken, and (*quare* or) may expand it in the inducement, and thus raise an issue in law; but both must be sufficient.” There the inducement to the special traverse in a replication to the defendant's plea was held *consistent* and good.—*Pearson v. Rogers* (9 A. & E. 303).

It appears to me the second and third pleas are not bad upon any of the grounds of demurrer assigned. 1st. They are not in confession and avoidance. The last case shews that when a special inducement is bad on that ground, it must in the matter of it confess and avoid: whereas all these pleas do is to plead as to the supposed breach of

covenant matter, which in the inducement argumentatively, though not directly, denies the breaches, and then concludes with a direct traverse thereof.

If upon a trial of issues taken on these pleas the defendant proved the special inducement, it would sustain the traverse of the alleged breaches. Both cannot be true ; and the traverse is consistent with the inducement.

2nd. The pleas are not double in the sense ascribed to them. If good traverses, they merely deny what the plaintiff alleges—namely, a dismissal—which in the declaration imports a wrongful dismissal and a refusal to teach ; which refusal is a fact, not a mere inference of law, like the implied wrongfulness of a dismissal not justified or excused. They do not directly or impliedly admit a dismissal. They do impliedly admit an omission to teach by reason of the plaintiff's wilful absence, but deny a refusal to do so. It is not stated as a ground of demurrer that if the defendant omitted to teach for any reason it was a *primâ facie* breach that ought to be excused by a plea of the special matter that excuses it—as the plaintiff's wilful absence, or that the absence was against the defendant's will, if that would make any difference.

3rd. The cause assigned does not point out what new matter the pleas allege that the plaintiffs are prevented answering. This general objection might be urged against every special inducement of new affirmative matter, though plainly amounting only to an argumentative denial ; for it is clear the opposite party is not allowed to plead to the special inducement, except under particular circumstances, as where the traverse or *absque hoc* is bad ; but that is not the case here. I think the traverse good according to the precedents (see ante) : they deny that the defendant discharged or refused to teach the plaintiff, as alleged. The latter allegation is a refusal, not a mere omission to teach.

4th. I think the inducement is inconsistent with the plaintiff's allegations of a wrongful dismissal and refusal to teach by the defendant ; and I may observe that the causes of special demurrer are so general in themselves that they

amount to little more than general demurrer,—not pointing out, as they should do, in what respect the pleas are open to the general objections assigned as grounds of demurrer.

The last ground of demurrer is contended to raise the objection that consistently with the inducement the defendant may have dismissed the apprentice at a former period and received him back again, after which he removed himself voluntarily, which may have been with the defendant's assent. But it appears to me to cover all the time comprehended in the breach, which alleges a service with defendant after the death of Mills until a certain time, when and on which day the defendant discharged him (the apprentice) and refused to teach him any longer; to which the defendant says that before the time of the supposed or alleged dismissal (until which time the declaration alleges the apprentice to have served) he did voluntarily and of his own free will leave the defendant's service, and had continued absent thence hitherto, traversing the discharge and refusal to teach by the defendant in manner and form alleged. This is not, however, stated as a cause of demurrer, with necessary precision to raise the point.

The fourth plea is, I think, bad. It is framed in confession and avoidance, but really in the matter of it amounts to an argumentative denial.

1st. The first ground of special demurrer is good; the plea does not give a sufficient excuse for not teaching as alleged. The second, third, and fourth seem also valid objections.

It is consistent with all the plea states that the defendant did dismiss and refuse to teach; but that the plaintiff Connell junior acquiesced therein, and departed voluntarily and of his own free will.

It is not alleged that he departed against the defendant's will, or that he was ready and willing to teach had he returned; in short, it does not answer what it professes to answer—that is, the whole declaration, including all the breaches therein assigned.

The defendant may have committed such breaches, although the apprentice at a certain time after a prior

dismissal and refusal to teach, &c., and returning into the defendant's service again, may have voluntarily departed and continued absent thence hitherto. But I do not think this, if intended, is pointed out distinctly as a ground of demurrer; and the plea, as already said of the second and third pleas, seems to cover all the time from the period until which the plaintiffs allege he did serve, and prior to which he makes no complaint.

5th. The fifth plea is also bad; for the second cause of special demurrer and the cases above noted, I think, clearly shew this,—such as *Adams v. Wordley* (1 M. & W. 374), *Capner v. Mincher* (13 M. & W. 704), and *Rex v. Inhabitants of Harberton* (1 T. R. 139), *Cumming v. Hill* (3 B. & A. 59).

The alleged mutual agreement between the defendant and Connell junior, if an infant, would not bind him in the first place.—*Parks v. Maybee* (2 U. C. C. P. R. 257, 5 Ex. R. 114-15.) Nor the other plaintiff, his father, in the second place.—*Cumming v. Hill* (3 B. & A. 59).

The plea takes no notice of the plaintiff's alleged willingness to serve, and notice thereof to defendant and request to teach, following the allegation of defendant's refusal to teach.—*Black v. Stevenson* (3 U. C. Q. B. R. 160), *Teller v. Beckford* (8 Taunt. 31, 1 Moor 460).

The cases respecting indentures of apprenticeship seem to be regarded on a footing differing from ordinary deeds, but it arises from the law relative to infants. The judgment, therefore, is against the demurrer to the first, second, and third pleas, and for the demurrer to the fourth and fifth pleas.

McLEAN, J., and RICHARDS, J., concurred.

MICHAELMAS TERM, 17 VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.

“ “ MR. JUSTICE MCLEAN.

“ “ MR. JUSTICE RICHARDS.

PATULO V. BOYINGTON.

A deed by the heir at law to his mother of certain lands in lieu of dower, is not to be considered as voluntary and fraudulent against subsequent purchasers, for value, &c., although the consideration expressed in such deed be money, and no money in fact be proved to have been paid.

A will devising lands in Upper Canada having been made in Lower Canada, (where testatrix lived), and being duly proved and enrolled among the records of the Court of King's Bench, and copies thereof directed to be made and given to the parties legally entitled thereto,

Held, That an office copy of such will, duly certified, &c., was equivalent to letters probate in Upper Canada, and could be registered as such.

Held also, That the concluding words of the will in this case operate as a devise of the land in fee, in trust, to sell, &c., and break the descent.

Writ issued 25th June, 1852. Ejectment for the North half of Lot No. 14, in the 5th con. Blenheim, with notice that plaintiff would proceed for *mesne* profits.

Plea, 17th July, 1852: Denial of plaintiff's possession as to the whole. It was admitted that James Rossiter Hoyle was entitled to the land in question as heir at law of his father Rossiter Hoyle, on the 21st of March, 1828.

The plaintiffs then produced and proved:—

1st. Deed dated 21st of March, 1828, from James Rossiter Hoyle to Lydia Huffton, widow of the late Rossiter Hoyle, her heirs and assigns for ever, in consideration of £500; among other lots, lot 14, in 5th con. Blenheim. A certificate is endorsed on the deed that it was registered in the registry office for the county of Oxford on the 16th May, 1830, and another certificate that it was registered in the county of Oxford on the 2nd July, 1851; a copy of the memorial and affidavit of execution were also put in.

The subscribing witness, George W. Hoyle, said of this deed, that he saw it executed; that at his father's death all the property went to his brother, James Rossiter Hoyle; that the grantee was the mother of both; that no money

passed between the parties when the deed was signed, and that it was made in lieu of dower, to which the grantee was entitled, and that it was executed to carry out a family arrangement; that the grantor must have got an equivalent for what he did, and mentioned his having got one thousand acres of land in the rear of Cobourg, and that his mother gave up all claim when the deed was executed.

It was admitted that Lydia Hufhton Hoyle died in December, 1842, in Montreal, Lower Canada; and to prove her will an instrument was produced, dated 6th of February, 1843, under the seal of office of J. J. Gibbs, notary public, Lower Canada, purporting to be a copy of a petition to the court of King's Bench for the District of Montreal, praying for a probate of the will of the said L. H. Hoyle, below which was written, "Let the probate pass." Signed Samuel Gale, J. K. B., Montreal, February 6th, 1843.

Then followed a copy of an affidavit, sworn the 6th of February, 1843, of the due execution of the said will by the testatrix, and an instrument, after setting out that due proof of the said will had been made, &c., by which it was ordered that the said will should remain deposited among the records of the Court of King's Bench; and that the same might be enregistered and copies thereof granted to whomsoever the same might appertain, &c.

Annexed was a copy of the last will and testament of L. H. Hoyle, and the whole of the foregoing was admitted in place of the original, and as if proved under the provincial statute, 14 & 15 Vic. ch. 66, sec. 4. Service of notice, that it was intended to be used was admitted. The will bears date the eighth of August, 1834, and among the things contained a clause that all lands belonging to her in Upper Canada, remaining unsold at the time of her death should continue unsold, in the care of my executors, until they see fit to make sale thereof as favorable occasions offer, and the proceeds of all sales of said lands to be divided in the same manner as the monies above (in said will) mentioned; that is to say, one seventh part thereof to each of my said children, (the said James Rossiter Hoyle

being one); and appointing Geo. Wm. Hoyle, Mary Anne Hoyle, and Lydia Sarah Hoyle, executors and trustees of said will, and the proceeds thus, "with full *power* to act beyond the year and day limited by law, and until such time as the same shall have been fully executed, hereby to the intent thereof, *divesting* myself of all and singular my estates, debts and property, real and personal, to them in trust, to and for the fulfilment intent and purposes of this my last will. In witness whereof, &c., and a certificate endorsed on each copy that the same were true copies of the originals remaining of record in Her Majesty's Court of King's Bench for the District of Montreal; also, a certificate that the probate was registered in the registry office for the county of Oxford, 30th of June, 1843.

Then a power of attorney, the execution of which was admitted, dated 26th of November, 1845: George Wm. Hoyle, Mary Anne Hoyle, and Lydia S. Hoyle, as executor and executrixes, &c., to Jeremiah Cowan, of the township of Blenheim, to take possession of certain lands to the estate and succession of the said Lydia H. Hoyle belonging, among others, the lot in question, and to sell the same to such persons to whom promises of sale had been given by the said Geo. Wm. Hoyle, and upon the terms agreed upon by him, acting as such executor; and as the attorney of the two executrixes, and the parties holding such promises of sale, and to execute all deeds, &c., which shall be necessary in the premises, and to receive all monies, give receipts, &c.; registered in the county register office 25th of October, 1850.

An indenture of bargain and sale, made the 8th day of October 1846; Geo. Wm. Hoyle, Mary Anne Hoyle, and Lydia S. Hoyle, as executor and executrixes, &c., by their attorney Jeremiah Cowan, of the first part, and *Thomas Patulo*, of the township of Caledon, farmer, of the second part; granting to said party of the second part, his heirs and assigns, forever, the north half of lot No. 14, in 5th con. Blenheim, in consideration of £116. Registered 14th of October, 1846.

The execution of the above deed was admitted, as also

the execution of the will of Thomas Patulo and his death. The will is dated 15th February, 1849, and devises this half lot to the plaintiff, charged with certain legacies, &c.

It was then proved by Cowan, the attorney, that he had charge of the lands since 1843, when Hoyle came up; and that he conveyed under the power the land in question; that he took charge until the power was afterwards sent to him, and had exercised acts of ownership till he sold to Thomas Patulo, to whom he delivered possession; and that plaintiff, after the death of Thomas Patulo, took possession and paid the balance of the purchase money due on the mortgage. On cross-examination he said there had been squatters on the lot before he sold to Patulo; another witness proved that he had possession of the lot under Patulo and plaintiff until 22d of March, 1851; when defendant entered, who said he had a deed of it.

Cowan, being recalled, said, that Hoyle had made arrangements with the people who were on the lands in some respects, that he (witness) thought that Patulo had bought out some of the squatters, and that witness released the mortgage, and remitted the proceeds to the trustees in Montreal.

On cross-examination he said George W. Hoyle had never made any promise to Thomas Patulo to sell and convey to him; that he (witness) made known to the trustees that Patulo had bought out the squatter who was upon the land; and that they recognized the sale to Patulo, and authorized him to release the mortgage.

The defendant's counsel objected—

1st. That the trustees had a power only and not an interest, and therefore could not delegate such power to another, but should have executed the conveyance to Patulo in person.

2nd. That the power of attorney was a limited one to sell to those persons to whom George W. Hoyle had given promises, which was not done.

3rd. That the documents in evidence were insufficient to prove the will of Lydia Hutton.

The first and last objections were overruled, and the second was reserved, with leave to defendant to move a non-suit, if at this stage of the case defendant could be admitted to move such objection.

The defence then proceeded, and George W. Hoyle was called by defendant, and all he said is incorporated in what has been already stated of his evidence.

The defendant then proved a deed, dated 23rd of September, 1844, from James Rossiter Hoyle, eldest son and heir at law of Rossiter Hoyle, deceased, who died intestate, to George Boyington, granting to said Boyington, his heirs and assigns for ever, lot No. 14, in 5th con. Blenheim, in consideration of £50, with a receipt for £50 on the margin: registered 27th of November, 1844.

With respect to this deed, the subscribing witness, Thos. W. Walsh, said he drew it; that the two came to his office and said the defendant was to let Hoyle have a lot back of Kingston, in part consideration, to give a mortgage for £25, and to pay some cash; that he drew a mortgage and witnessed the execution thereof: registered 27th of November, 1844. On cross-examination, Walsh said, he never saw the person calling himself Hoyle before that day or since; that they came to his office (where not stated, but seemingly in Simcoe), in the forepart of the day; that he prepared the papers; that they returned in about an hour and executed them; that not more than £2 10s. in cash was paid. The defendant on his own behalf said he owned a lot in Oro, and was going to see it; that he was desirous of finding some one with whom he could exchange lands; that he found James R. Hoyle and made a bargain with him for the exchange; that it took place at Kingston; that they went up and searched the registry, and that he was assured there was nothing against it: that afterwards James R. Hoyle, executed the conveyance to him; that he bought it for £50, and before doing so he went to see the land, and saw there was a squatter upon it.

Then a memorial of the will of Lydia Huffton was put in to shew its terms, as follows: "A memorial of an *office copy* of a will made by Lydia Huffton, deceased, widow of Rossiter

Hoyle, of and concerning all the lands, &c., which the said Lydia Huffton died possessed of in the county of Oxford; duly witnessed, &c., and proved before the Hon. Samuel Gale, one of the justices of the Court of King's Bench for the district of Montreal; and that this memorial thereof was required to be registered by George W. Hoyle, one of the devisees therein named. Witness, &c. Proved by the affidavit of George Platt."

The defendant's counsel then contended that the registry by the signature of George Wm. Hoyle, was not sufficient within the statute, and that the registry was made not of a probate of a will, but of a copy.

It was then agreed that a verdict should be rendered for the plaintiff, subject to the opinion of this court on all the points; the learned judge (Burns J.) who tried the cause inclining to the opinion, that on the evidence the deed from James R. Hoyle to his mother was not a voluntary conveyance; and no other facts being matters of doubt, but all depending upon the legal effect of the evidence upon the rights of the parties respectively, it was reserved for the court to consider whether the evidence was sufficient to establish that the deed was voluntary; and to direct a verdict for the defendant if the court thought it should be so entered. Power was also reserved to the court to direct a special case, if necessary, to take the opinion of the Court of Appeal.

The verdict was accordingly entered for the plaintiff, with nominal damages.

In Easter Term following, *Read*, for the defendant, obtained a rule upon the plaintiff to shew cause why the verdict should not be entered for the defendant, or be set aside as against law and evidence.

In Trinity Term last, *Read* supported his rule, and made three points:

1st. That the deed from James R. Hoyle to his mother was voluntary, and therefore void as against a *bona fide* purchaser for value, which the defendant was; consequently, that the defendant held a good title under James R. Hoyle as heir at law to his father.

2nd. If not, that being also heir at law to his mother, and inheriting from her, his deed must prevail in preference to her will; neither the will nor the probate thereof having been duly registered before the deed from the heir at law to the defendant; that only a copy of the will had been registered in due time, which was insufficient.

3rd. That if the will prevails, the executors took only a power to convey under it, which could only be executed formally, and not by a substitute attorney; or, if the executors took an estate in fee, as trustees under the will, still the power of attorney to Cowan was a limited authority, only enabling him to convey to persons to whom promises of sale had been given by George Wm. Hoyle, one of the devisees, and the actual trustee in relation to the lands in Upper Canada.

1st. As to the 1st—he objected to the evidence received to prove consideration, as inconsistent with the consideration expressed in the deed, and inadmissible; that no consideration could be shewn other than the £500 stated in the deed; that the relinquishment of dower, if admissible in evidence, was not duly proved; and that it was a question for the jury whether the deed was voluntary or not; wherefore it ought to have been submitted to them, but was not.—*Gale v. Williamson*, 8 M. & W. 405; *Rex v. Inhabitants of Cheadle*, 3 B. & Ad. 833, 1 V. S. 128.

That if voluntary, the devise and sale by her trustees would not avail; as the heir at law had conveyed, and the deed been registered before the will had been duly registered or the conveyance by the trustees had been made.

2nd. That the memorial was too vague and uncertain in its contents, and did not describe the lots, concessions, or townships to which the will related; also, that there was no proof that by the laws of Lower Canada the certified copy produced to the registrar was a probate, or equivalent to a probate of the will; wherefore the registration was invalid on two grounds. He referred to prov. stat. 58 Geo. III. ch. 8, secs. 1 and 2; *Sugden on Vendors*, 11 edition, 211, 971; *Bigg on Registry*, 96, note S.; 2 Stra. 106. Also, that the will had not been duly proved.

3rd. That the will may give a power, coupled with an interest, owing to the concluding words thereof; but even if the devise so, was in trust and formal, and could not be executed by attorney—9 Rep. 75; 2 Roll's R. 593, 329; 1 Roll's Rep. 330, 501; 1 Vent. 338, 339; *Hawkins v. Kemp*, 3 East. 410, 411; *Ingram v. Ingram*, 2 Atk. 88, 2 S. & Lef. 330; *Chance on Powers*, 699, 700, 705; 2 Preston's Ab. 249, 250; 2 Ib. 67, 68.

That the power being limited, it was necessary to prove a promise to sell to Patulo; which must be construed to mean a valid promise in law, requiring written proof; and that there was neither written nor oral proof of any such promise, express or implied; nor was there any legal proof of confirmation; wherefore the deed of conveyance to Patulo by the attorney of the trustees was inoperative in law.—Com. Dig. Attorney, ch. 13; Co. Lit. 258 (a); Com. Dig. B. 5 p. 267; *McMoran v. Hibblewhite*, 6 M. & W. 212; 11 Ib. 466, 778, 793.

At all events he relied strongly upon the priority of the deed to the defendant from James Rossiter Hoyle, the heir at law of both the father and mother, before any valid registration of the will, and of its becoming a registered title when the deed from him to his mother (whether voluntary or not) was registered.

J. Duggan, for plaintiff, contended: 1st. That there was sufficient evidence of the defendant's having entered surreptitiously and forcibly, to entitle the plaintiff to restoration of possession irrespective of title.

2nd. That the evidence shewed clearly that the defendant had no case; wherefore the plaintiff being in peaceable possession, and wrongfully ousted by the defendant, was entitled to recover.

That Cowan was agent for the devisees, and in possession in 1843 and 1844; although he did not receive a formal power of attorney until 1845.

3rd. That the possession being held by them since 1843, and afterwards by Patulo under them, there was an adverse possession as against the heir at law, whose deed to the defendant was therefore void.

4th. That *prima facie* the plaintiff was entitled to recover resting on possession alone, and was also entitled as having a good paper title.—Doe dem. Hughes v. Dyball, 3 C. & P. 610 ; Doe dem. Harding v. Cooke, 7 Bing. 346.

5th. That the deed from James R. Hoyle to his mother was not voluntary, but founded on good and valuable consideration, as the witness proved; that the real consideration might be shewn, and was consistent, and not inconsistent with the consideration expressed.

6th. That the real consideration came out on the defendant's examination of the witness ; and it did not lie in his mouth to say the proof was not formal and strictly legal evidence. That his object was to disprove consideration; and, in attempting to do so, he established it: that the attempt to impeach this deed took the plaintiff by surprise, no notice of such intention having been given, and the plaintiff unprepared to encounter the objection ; wherefore informal proof to such a point was admissible, and the will was admitted, and the copy produced also admitted to be a copy of it, reserving the objection as to the registration, which was sufficient : 1st. As to the terms of the memorial, though general, which followed the will—Doe Laury v. Grant, 7 U. C. Q. B. R. 125. 2nd. As to the instrument produced to the registrar, that the certificate endorsed proved registration and the will was admitted; wherefore the will was in effect registered, though the certified copy was not a regular probate.

He submitted, further, that in reference to the registry acts, and the terms of the instrument in question, and the evidence, &c., it would sufficiently appear, or should be intended in the absence of any proof to the contrary, that it is a probate according to the course of granting administration of wills in Lower Canada, though somewhat different from ours.

7th. That the will imparted both a power to sell, and an estate in fee to the executors, and that the power of attorney was sufficient to support the conveyance, the terms having been virtually if not literally followed.

8th. That the defendant had notice of the prior deed

from James R. Hoyle on the face of the registry books; which deed imported consideration; and yet he made no enquiry.

That to impeach it, or to raise the objection of non registration of the will, he should first prove that the deed under which he claimed was founded upon, and supported by, not only valuable, but adequate consideration, and that no consideration was proved, at least not legally proved, beyond the small sum of £2; which, compared with the value of the land, was a nominal, and not a substantial or *bona fide* consideration: and that, if it turned upon the deed to the defendant being from the heir at law of the devizor (the mother), and executed prior to a valid registration of her will, there was no sufficient proof that he was her heir, as she might have been married before marrying with James R. Hoyle's father, and have left issue of such former marriage her surviving; and that the contrary was not shewn.

Patterson, for plaintiff in the same suit, referred to the provincial stat. 16 Vic. ch. 19, sec 5; and contended the proof of the will was sufficient, even if opposed, instead of being admitted as it had been.

That the will imparted an estate in fee, being equivalent to a devise to sell, and not a mere discretion that they should sell; and that the will breaks the descent—12 Eng. Rep.; *Doe Laury v. Grant*, 7 U. C. Q. B. R. 500; *Doe d. Reen v. Walbank*, 2 B. & Ad. 554; 7 Ex. R. 680, 683, 720; *Johnson v. Dealtry*, 3 B. & Al. 84; 1 Sug. on Powers, 130.

That being devisees in fee, they could confer a power to convey by letter of attorney—Hard. 419; 9 Co. 75. (b)

That if only a mere power, they might delegate authority to execute the deed; and if so, that the letter of attorney was sufficient, and the sale and conveyance under it effectual.—9 M. & G. 236; *Hunter v. Parker*, 7 M. & W. 322.

That the evidence sufficiently established a confirmation or recognition of Patulo, as entitled to be recognized as a person to whom a promise of sale had been made; and

that adoption of his mortgage, and the acceptance of the purchase money &c., from him and this devisee sufficiently ratified the transaction—Co. Lit, 363 (b); Ba. Ab. Title C.; 2 Smith's L. C. 438; 1 Taylor, 86.

That the objection of excess of authority does not lie in the defendant's mouth, who is a wrong-doer and tortious possessor.

That the defendant had not proved his own title-deed to have been founded on sufficient consideration.—7 U. C. Q. B. R. 240; Taylor Ev. 2749.

That the plaintiff may prove consideration additional to support his deed—Gale v. Williamson, 8 M. & W. 405.

That the will was registered in due time, and the plaintiff holds for value; that the defendant's counsel produced a memorial thereof, and it contains all the statute requires.

That calling the instrument certified by the registrar a copy or probate, &c. was immaterial, the original memorial being produced, which sufficiently shewed the will to have been registered; and that it does not rest upon the effect of the certificate endorsed upon the office copy of the will, but upon the original memorial itself through which the will was registered, even if not duly certified to have been so registered.

That it is sufficient for the memorial to be signed by one of the devisees.

Lastly, he relied upon prior possession under the will, and upon the last deed from the heir at law to the defendant being invalid—Doe d. Hughes v. Dyball, 3 C. & P. 610; Doe d. Harding v. Cooke, 7 Bing. 340.

Read, in reply, said that if it turned upon mere possession there should be a new trial, as the evidence on that head had been rejected at the last trial.

That defendant's notice of the former deed from the heir at law was immaterial—Slatterie v. Pooley, 6 M. & W. 664; Whitfield v. Braud, 16 M. & W. 282.

That the defendant gave sufficient proof of consideration on his part—Cow. 595; Doe d. Edwards v. Gunning, 7 A. & E. 240.

MACAULAY, C. J.—The first question is, whether the deed of the 21st of March, 1828, was what is termed voluntary and void as against the deed of the 23rd Sept. 1844, under the statute 27 El. c. 4, which enacted that every conveyance, &c. made for the intent and purpose to defraud and deceive, such person as should afterwards purchase, &c. should be deemed and taken only as against that person, &c. who should purchase for money or *other good consideration* the same lands, &c. to be utterly void, &c.; not extending however (see sec. 4) to any conveyance of lands, &c. made upon or for *good consideration and bona fide*. Good consideration means valuable consideration.—3 Co. 83, pl. 2, Cro. El. 445; And. 223.

This statute has been so stringently construed, that what ought to have constituted a matter of fact for a jury—namely, the intent and purpose to defraud, &c.—has become an inference of law upon mere proof that the first deed was voluntary or without valuable consideration, and the second for value. However, assuming that although a valuable consideration is expressed on the face of the deed, any such consideration may be disproved, notwithstanding dicta to the contrary (a). I do not think the existence of a good and valuable consideration is repelled, and *prima facie* it is to be taken to have existed according to the import of the deed. Nor do I think the plaintiff precluded from shewing that the real consideration was something else than money or cash, if valuable in itself.—Gale v. Williamson (8 M. & W. 405-9-11); Robarts on Stat. 13 El. c. 5, and 27 El. c. 4, p. 15, 66.

Nor do I think the defendant gave any better proof that he was a purchaser for value. I cannot regard him as a *bona fide* purchaser; and on this evidence to hold him a purchaser for value, and the deed to the widow Hoyle or Huffton without consideration, would, it seems to me, be assisting the heir at law and the defendant to accomplish a fraud upon the devisees, instead of protecting a fair purchaser against a prior fraudulent conveyance; and I

(a) 2 Hev. on Frauds, 102-3; 2 S. L. 501; 2 Wil. 348; 8 East. 236; 13 Vez. 318.

cannot see why an act professedly made to prevent fraud should be made the medium of effecting it.—See Roberts on Frauds 373; Cow. 705; Doe d. Parry v. James (16 East. 212, 2 Ver. S. 10, 11; Holt v. Frederick (2 Wil. 356); Duffield v. Scott (3 T. R. 375-6); Clifford v. Jurill (9 Ju. 633, 2 C. M. C. R. 76, 84); Johnson v. Legard (6 M. & S. 60); Hill v. Bishop of Exeter (2 Taunt. 69); Doe d. Otley v. Manning (9 East. 79, 18 Ver. 110).

The plaintiff may shew the consideration to have been money or money's worth, and so good and valuable; and as far as the evidence goes, it supports a valuable consideration. It does not rebut it, nor shew the deed to have been by way of gift.

The evidence equally (at least) tends to shew the deed to the defendant colorable and without substantial consideration, and designed, under color of a *bona fide* purchase, to frustrate the prior conveyance, of which the defendant, had he searched the registry, must have had notice. A valuable consideration is proved in support of the one as much as the other, though both informally.—Doe d. Eberts v. Wilson (4 U. C. Q. B. R. 386), Doe d. Ellis v. McGill (8 U. C. Q. B. R. 224-6); Doe d. Newman v. Rusham (16 Ju. 359, S. C. 21, L. J. Q. B. 139). As a conveyance by the heir at law, the statute, 27 El. c. 4 does not apply.

2nd. The next question is the effect of the registration of the will.

The statutes 35 Geo. III. c. 8, and 9 Vic. c. 34, speak of registering memorials of deeds and wills, &c. after the confirmation of lands by grant from the Crown; and, unless it is to be presumed, there is no evidence here when the patent for this land was sealed. In the argument it was assumed to have preceded the death of Rossiter Hoyle, the father of James R. Hoyle, his heir at law; and that the deed from the latter to his mother having been registered in her lifetime, it became necessary to register her will, in order to prevent its being overreached by a conveyance

from her heir at law, the same James R. Hoyle, if previously registered.

Then, assuming registration to be necessary, the next consideration is, whether the document of which a memorial was registered was a probate of the will, though emanating from a jurisdiction foreign to Upper Canada ; and I think it was.

In an ejectment like this the law of Lower Canada could not be specially pleaded, and may therefore be proved. the statute. 7 Vic. c. 4 makes copies of the laws of Lower Canada, printed by authority, evidence in the courts in Upper Canada.—See also 12 Vic. c. 10, sec. 5, No. 27.

Then in the revised statutes of Lower Canada (p. 190, 191) we find the 41st Geo. III. c. 4, sec. 2, of which (after reciting that doubts had arisen touching the method then followed of proving last wills and testaments made and executed according to the forms prescribed by the laws of England, before one or more judges of the courts of civil jurisdiction in this province) enacted that such proof should have the same force and effect as if made and taken before a court of probate.—See also 4 Vic. c. 40, sec. 11-14, *ib.* p. 201-202 ; for the registry of titles to land in Lower Canada speak of producing to the registrar the will, or the probate or office copy of such will. Our statute on the subject of probate or surrogate courts is the statute 33 Geo. III. ch. 8, and it shews, as the term imports, that probate is proof of the will ; and see sec. 6, Cow. 595, 7 A. & E. 240.

It seems to me therefore that the document in question is the probate, or equivalent to the probate, of the will.

Then arises the consideration whether registration of a memorial of such a probate be sufficient, or whether it is necessary that the will itself should be produced, or a probate thereof be obtained from the Court of Probate in Upper Canada.

I think, one reason why the production of the will was not in all cases required, like deeds, was because upon probate the will itself required to be filed in the court

granting such probate, wherefor it could not be produced ; and the probate was rendered equivalent, although the proof of the will in the Probate or Surrogate Court was only valid in relation to the personal estate of the testator. The same difficulty in producing the original will after probate exists in relation to Lower Canada and other foreign jurisdictions, as well as in Upper Canada ; and, to obtain a domestic probate after probate abroad, it would not be necessary to transfer the original will and to prove it *de novo*—but, upon proof of the foreign probate, a local probate founded thereon would be granted ; consequently no additional authenticity in the way of proof would be given to the will, and a devisee of lands in Upper Canada might not desire to obtain probate of the will for the mere purpose of registering a memorial thereof.

On reference to the 58 Geo. III. ch. 8, secs. 1, 2, I think it the reasonable construction that a colonial probate may be registered. Sec. 1 enacts that, whensoever any person residing in any colony of Great Britain should have occasion to make or publish any will, whereby lands in Upper Canada might be affected, it should be lawful for the parties concerned to execute a memorial of such will, or probate of the same, in like manner as was authorised and directed by the said recited act of 35 Geo. III. ch. 5, which speaks of wills, or probate of the same, or thereof generally, not saying probate in the Probate or Surrogate Court, of Upper Canada. Sec. 2 provided for proof of deeds or wills made or published in other colonies ; and enacted that, in case of wills, one of the witnesses to the memorial of such will, or probate thereof, should prove the execution of such memorial by affidavit, sworn before the Chief Justice or Judge of the Supreme Court of any colony, &c., which should be brought to the registrar, and be a sufficient authority to him to give the party who brought such will, or probate thereof, and the memorial of the same, together with such affidavit, a certificate of the registry of the same, in like manner as if the execution thereof had been proved before the said registrar or his deputy as aforesaid. See

also 9 Vic. ch. 34, secs. 8-10; 13 & 14 Vic. ch. 63, sec. 45; 16 Vic. ch. 187.

Now I think the 58 Geo. III. ch. 8, which was the law in force at the time this will was registered, clearly authorised the memorial of the probate to be proved in Lower Canada; and that a probate duly obtained there might be substituted in lieu of the original bill, and this although no action in respect of the assets of the testator could be maintained here by the executor without obtaining confirmation of such probate by the local Court of Probate having jurisdiction in Upper Canada. This view is strengthened by the terms of the 9 Vic. ch. 34, sec. 10, and 14 & 15 Vic. ch. 66, sec. 4, and 16 Vic. ch. 187, sec. 5; *White v. Hunter* (1 U.C. Q.B.R. 452.)

I do not think the registration of the will invalid because the memorial on the face of it speaks of its being a memorial of an office copy of the will, the instrument referred to being in legal effect both a probate and office copy of the will.—9 Ju. 371, *Regina v. Registers of Middlesex* (7 Q.B. 156, 14 Ju. 1001, 15 Q.B. 976, 8 Hare, 159).

As to the sufficiency of the memorial in relation to the lands devised, the lands are in effect mentioned in such manner as the same are expressed or mentioned in such will, or to the same effect. The will embraces all the lands of the testatrix in Upper Canada. The memorial is of an office copy of a will, dated 8th August, 1834, made by Lydia Huffton, &c., of and concerning all the lands, tenements and hereditaments, which the said Lydia Huffton died possessed of, in the county of Oxford, district of Brock, in the said province (of Upper Canada). The will itself is of whatsoever lands in Upper Canada belonging to her, &c.; and the prior registration of the deed of the 21st March, 1828, shewed that the lands in question belonged to her and were in the county of Oxford.

It is not contended the will was not registered in due time. *Doe d. Eberts v. Wilson* (4 U.C.Q.B.R. 386), *Doe d. Ellis v. McGill* (8 U.C.Q.B.R. 224, U.C.Q.B.R. H. T. 7 Wm. IV).

As to the effect in evidence of an examined copy of a

memorial of a deed registered, see *Doe dem. Loscombe v. Clifford* (2 C. & K. 448).

As to the sufficiency of the proof of the will, the statute 14 & 15 Vic. ch. 65, sec. 4 (in force when this action was brought,) and the 16 Vic. ch. 19, sec. 8 (passed since the last act but before the trial of this cause), shew, I think, that the proof is sufficient, if not admitted at the time. See also 9 Vic. ch. 334, sec. 10; 12 Vic. ch. 77; 13 & 14 Vic. ch. 63, sec. 5.

If the registration was deemed invalid it might become material to consider—

1st. The effect of the provincial statute 4 Wm. IV. ch. 1, sec. 2, regarding James R. Hoyle as the heir at law of his mother, and as such entitled to inherit her estates acquired by purchase.

This statute preceded the will, and might affect the descent (see secs. 2 and 10), though the present is probably not a case within the act.

2nd. That when the deed to the defendant was executed the devisees under the will, or others, were in actual possession, and had disseized, abated, or tortiously and adversely entered upon the heirs, &c. But in my view of the point raised, it does not depend upon these considerations; although I look upon James R. Hoyle as the heir at law of his mother, so far as that goes.

3rd. Then comes the effect of the will; and I think that the concluding words (and the last in a will are to be taken) operate as a devise of the lands in fee in trust to sell, &c., and break the descent. It was executed after the 1st July, 1834, mentioned in the provincial statute 4 Wm. IV. ch. 1.—See *Cro. El.* 80, *Co. Lit.* 113 a, *Dene*; *D. Bowyer v. Judge* (11 East. 288). Consequently that the devisees, though only trustees, being seized in fee, might sell and convey through their attorney. It is not like the cases cited, in which a mere power or authority has been held a formal trust or confidence, not capable of delegation or of being executed by substitution of another.

4th. Then, as to the validity of the deed to Patulo under the power of attorney, it is, I think, very doubtful whether

the proof went far enough to sustain the action strictly as proved.

The power of attorney was qualified and restrictive in its terms ; and if Patulo was in a situation to take a conveyance under it, as the assignee of a person to whom George W. Hoyle had promised to sell, or if the conveyance had been affirmed by the adoption and approbation of the devisees, as alleged, the facts ought to have been more distinctly if not more formally shewn. George W. Hoyle, though a witness and examined several times in the course of the trial, does not appear to have been particularly interrogated upon these points.

It might perhaps have been left to the jury to say whether, from the adoption of the act by the devisees, they inferred that Patulo was one of the persons contemplated and intended to be referred to in the power of attorney, or that he was a person or the assignee of a person to whom George W. Hoyle had promised a deed, at the price and on the terms observed, without other more direct proof thereof.

I however consider the plaintiff entitled to recover, even admitting the imperfection of the title as derived under the power of attorney under the letter of attorney of the devisees.

1st. If the deed of the 21st March, 1828, be valid in law, then, according to our decision in *Doe Cuthbertson v. McGillis*, 2 U. C. C. P. R. 124, the widow Hoyle became seized in fee by force of the Statute of Uses, and upwards of twenty years had expired before the defendant entered, on the 22nd March, 1851. Any right of entry in the heir at law of Rossiter Hoyle, or those claiming under him, had therefore been lost

2nd. If the right of entry of James R. Hoyle, as heir at law to his mother, be computed from her death in January 1843, of course the Statute of Limitations would not operate to bar the defendant's right of entry.

But if the deed of 1828 is valid and the will duly registered, no right of entry every accrued to the defendant as claiming under her heir at law.

3rd. That we have it in evidence that the widow Hoyle

in her life-time, and the devisees after her death, had been seized in fee in possession upwards of twenty years when the defendant entered ; and that at the time of such entry the plaintiff or his tenant was in actual possession, holding or claiming to hold under such devisees ; and the defendant shews no valid paper title or right of entry at all. Without therefore resting the case solely upon the surreptitious nature of his entry, I think that, considering the nature and length of the possession held and enjoyed by the party he ousted, under the widow Hoyle or Hufiton and her devisees, that, in the absence of any in the defendant, the plaintiff is entitled to recover, although his title under the devisees may be defective.*

If the devisees were plaintiffs they could recover, unless a valid title was transferred to Patulo under the power of attorney ; and, seeing that the devisees had long been in peaceable possession under a title which had existed upwards of 20 years, I think the defendant ought to have brought an ejectment to try his title, instead of endeavouring to establish it in the way attempted, after having quietly submitted to the possession of the devisees for seven or eight years after he obtained from James Rossiter Hoyle the deed on which he relies.

Mr. *Read* said in argument, that if it turned on possession a new trial should be granted, because the evidence on that head was rejected at the trial ; but I do not see that any evidence respecting the circumstances or manner of the defendant's entry was rejected at the trial, or that there is any reason to doubt the fact that the defendant entered of his own accord, privately, in the absence of the plaintiff or his tenant ; which entry, unless the deed on which he relies can be established, was clearly tortious and unwarrantable.

*The following authorities were cited by the Chief Justice, as applicable to the foregoing points ; Cow. 395 ; 3 C. & P. 610 ; 1 M. & M. 346 ; 2 Saund. 111 and notes ; 7 Bing. 346 ; 1 A. & E. 119 ; 7 A. & E. 235, 246 ; C. & M. 82 ; 5 C. & P. 575 ; 3 M. & R. 111-2 n ; 7 M. & W. 593 ; 2 C. & K. 448 ; 5 Taunt. 326 ; 6 Bing. 179 ; 9 A. & E. 662 ; 10 U. C. Q. B. R. 351.

If the deed of 1828 was displaced as voluntary and fraudulent and void as against the deed to the defendant of 1844, and the will consequently inoperative, as constituting only a gift, though the devisees would take by purchase, the plaintiff would be reduced to rely upon mere length of possession, and in that event the Statute of Limitations would not afford him protection. My opinion rests upon the deed of 1828, and the will being valid, and the plaintiff being possessed and holding in privity therewith when the defendant, after the lapse of twenty years from the date of execution of such deed, having wrongfully broke and entered into the possession of the premises.—Doe dem. *Woodhouse v. Powell* (8 Q. B. 576), Doe dem. *Carter v. Barnard* (13 Ju. 915).

Of course, if the deed of 1828 and the will were displaced by force of the deed of 1844 to defendant, he would be entitled to retain possession, as having the better title thereto.

It may however be further remarked, that in the deed of the 23rd September, 1844, James R. Hoyle described himself as eldest son and heir at law of Rossiter Hoyle, his father, and not as heir at law of his mother; implying that it was as heir of his father he assumed a right to convey the land to the defendant. Moreover that this deed was immediately followed by a reconveyance from the defendant to the said James R. Hoyle, in fee, by way of mortgage, to secure £25 payable with interest two years after date, but whether paid or not not appearing. If not paid at the day, the right of entry would be in James Rossiter Hoyle and not the defendant; that is, assuming the previous conveyance to the widow and her will were displaced, in which event it would be the case of a mortgagor not entitled to possession entering under circumstances in which he could not have maintained ejectment, and thereby forcing the party ousted to an ejectment, and endeavouring to retain a possession so acquired, not resting upon the validity of his own title, but relying upon imperfection in that of the party he had dispossessed. The defence set up, in effect, is, that the legal estate is in James R. Hoyle, as

mortgagee of the defendant ; for, while the mortgage subsists, the defendant has no legal right of entry of possession.

McLEAN, J., and RICHARDS, J., concurred.

JOSEPH MCKAY V. JAMES HALL.—JAMES CHARLES JOHNSTON
ET AL V. JAMES HALL.

A judge of the County Court has power to grant a certificate for speedy execution.

These cases were brought down by writ of trial before the judge of the County Court of the United Counties of York, Ontario and Peel, who certified on the same day that in his opinion execution ought to issue forthwith for the verdicts. In Michaelmas term last *Eccles* obtained in each case respectively rules calling on the plaintiff to shew cause why the judgments entered and the executions issued thereon should not be set aside, on the grounds—That no formal returns had been made by the judge upon the said writs of trial ; that the writs of trial had not been first returned and filed in the Crown-office, or remained there for the space of six days ; that the judge of the County Court had no authority to grant such certificate as aforesaid.

Hagarty, Q.C., shewed cause, and contended that there is no reason why the judge of the County Court should not certify for immediate execution after a judge of the Superior Court has said the cause was a proper one to be tried by him ; that the judge of the County Court is the only person who can certify for costs, because the act says it must be done by the judge who tried the cause ; that the certificate of a judge, erroneously made up, may be amended.—3 & 4 W. IV. ch. 42, sec. 19.

Eccles supported the rule.—That the Imperial statute 1 W. IV. applies to judges of the superior court, and the act which authorizes the writ of trial was passed after ; that the judge who tries the cause has the right to make certain

amendments; that the act of 1852 cannot be carried back and embodied in the act of 1845; that no power can be given to judges of the County Court to grant certificates for immediate execution except by express enactments; that his being a judge of the County Court does not make him a judge under the act with power to certify; that he is only delegated by the act and writ to try the writ, and then his power ceases; that amendments are different from the granting certificates, because amendments are made during the course of the trial, but after the jury find their verdict he has no power except to endorse his verdict and make his return; that the 56th section of the statute 8 Vic. directs what is to be done after the verdict, and that the judgment shall not be entered for six days; that the act authorizing the writ of trial cannot be altered except by an act with express enactments referring to the former act; that the judge of the County Court has no authority to order a judgment to be entered in a superior court before the time for entering judgment regularly in that court.

MACAULAY, C. J., delivered the judgment of the court. (*a*)

It seems clear that the judges of the County Court are judges within the statute 16 Vic. ch. 175, sec. 27, from the circumstance of their being spoken of as such in that section, which includes both the Superior and County Courts. I think the writ of trial is virtually a record, although not so termed, and that the certificate of the judge of the County Court thereon entitles the plaintiffs to speedy execution. I do not perceive that it deprives the defendant of any rights he might otherwise have exercised, and seems quite within the spirit, true intent, and meaning of the statutes.

The papers filed do not show that the judge's returns were informal or in any other respect improper, or that they were not returned and filed in the Crown-office before or at the time of the entry of the judgments. The opinion

(*a*) The following statutes show the powers conferred on the judges of the County Court, and are applicable to this case:—8 Vic. ch. 13, 12 Vic. c. 63, 13 & 14 Vic. c. 52, imp. stat. 1 W. IV. c. 7, 3 & 4 W. IV. c. 42.

expressed upon the main objection determines that it is not necessary that they should have remained there six days before the plaintiffs acted thereon by entering judgment, having obtained a sufficient certificate for speedy execution.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

JOHN MITCHELL AND JAMES MITCHELL V. JOHN HARPER.

A declaration in case stated that the plaintiffs were possessed of a certain warehouse, and that defendant, in digging an excavation or cellar on the adjoining close, did not use due care and skill, or take reasonable or proper precautions, in and about digging the said cellar; but so carelessly, unskilfully, and improperly behaved himself in the premises that the said warehouse became injured, &c., and the wall of the said warehouse sunk, gave way, and fell in; by reason whereof divers goods of plaintiffs were destroyed, &c. Plea, not guilty.

Held, that the plea of not guilty merely traverses and puts in issue the wrongful act alleged, which in substance is the excavating so near the plaintiffs' close without using necessary precautions to prevent accidents, that thereby the plaintiffs' wall fell down; that if defendant meant to assert a right to excavate up to the division line between the two closes, he should have pleaded it specially.

The declaration states that the plaintiffs, before and at, &c., were possessed of a warehouse on, &c., and used the same for the storage of goods; that just before and at the time when, &c., the defendant was about to dig, and did dig a cellar or excavation in and upon the close next adjoining the land whereon said warehouse was built, and thereupon it became and was defendant's duty to use due care and skill, and to take reasonable and proper precautions in and about digging the same, so that plaintiffs' said warehouse and the goods therein might not be damaged, &c. Yet that defendant did not use due care or skill, or take due, reasonable, or proper precautions in and about digging the said cellar or excavations, &c., but so carelessly, unskilfully, and improperly behaved and conducted himself in the premises that the *said* warehouse became and was greatly shaken, weakened and injured, and afterwards, to wit, on &c., the northern wall of the said warehouse sunk, gave way, and fell in, and became and was greatly injured and in part destroyed; by reason whereof divers goods of

plaintiffs—to wit, molasses, &c.—then being therein, were broken, spilled, spoiled, and destroyed, and plaintiffs—to wit, for three months—lost the use of said warehouse, and were put to expenses, &c.

Plea—Not guilty, and issue.

At the trial, before *Richards, J.*, it appeared that the defendant excavated a cellar on the close adjoining the plaintiffs' wall on the north to a depth of four feet below the bottom of plaintiffs' wall, and quite up to the limit of the adjoining close, and up to the plaintiffs' close, so that the plaintiffs' wall stood unsupported by the earth of such adjacent close; that on the day before the fall of the plaintiffs' wall the defendant had placed shores and supports against the outside of the plaintiffs' wall some distance from and above the level of the ground, but not below or along the lower line of such wall, and that the defendant had laid some of the stone wall intended for the building he was about erecting at the bottom of his excavation and against the earth of the plaintiffs' close, but below the plaintiffs' wall, and that the new wall had not reached within several feet of the bottom of the plaintiffs' wall; that in the course of the night following the plaintiffs' wall gave way, the lower part sinking from the bottom into the defendant's excavation, and the upper part (owing, it was said, to the shores preventing its falling outwards) fell in upon the plaintiffs' molasses, &c., and damaged the same.

The jury found for the plaintiffs, on the ground that the defendant had not taken the necessary precautions to secure the plaintiffs' wall.

Wilson, Q. C., in the following term, obtained a rule *nisi* to set aside the verdict and to enter a non-suit, or for a new trial, the verdict being against law and evidence, and for misdirection, or to arrest judgment.

The main points of the argument were—1st. Whether the defendant or the owner of the adjoining close had a legal right to excavate up to and below the plaintiffs' wall as he did; and if not, whether the defendant had been guilty of negligence in the premises.

Hagarty, Q. C., shewed cause—That the defendant was

bound to do everything that skill could suggest—*Wyatt v. Harrison*, 3 B. & Ad. 871; *Jones v. Bird*, 5 B. & Ad. 857. That if the plaintiffs' wall was in a bad state, the defendant had no right to do anything that would accelerate its fall—*Dodd v. Holme*, 1 A. & E. 493; *Smith v. Martin*, 2 W. Saund. 400; *Trower v. Chadwick*, 3 Bing. N.C. 334; S. C. 6 Bing. N. C. 1. That what one does on his own land he must do in such a manner as not to injure another—*Harris v. Reding*, 5 M. & W. 60; *Vaughan v. Menlore*, 3 Bing. N. C.; *Humphreys v. Bryden*, 12 Q. B. 735; *Hinton v. Whitehead*, 12 Q. B. 734.

Wilson, Q. C., supported the rule—That the defendant is not liable unless he commits an injury to the rights of plaintiffs; that the defendant has not invaded their rights; that the declaration shows no right in the plaintiffs to have their wall supported by the defendant's; that the plaintiffs have only the right to have their soil supported, and not their building—*Humphreys v. Brogden*, 12 Q. B. 719, and the cases cited by *Hagarty*, Q. C.

MACAULAY, C. J., delivered the judgment of the court.

Without going into the main and general question raised at the argument of this case, the case of *Jeffries v. Williams* (5 Ex. R. 793) seems to me to decide that on these pleadings the plaintiffs are entitled to recover. In this case, as in that, the plaintiffs do not admit in their declaration any possession or other right in the defendant to the close excavated by him; it treats him as a mere wrong-doer. The plea of not guilty merely traverses and puts in issue the wrongful act alleged, which in substance is the excavating so near the plaintiffs' close without using necessary precautions to prevent accidents, that thereby the plaintiffs' wall fell down, &c. That case shows that if the defendant meant to assert a right to excavate up to the division line between the two closes, he should have pleaded it specially and so justified, traversing only the alleged negligence.

If the case depended upon the right of the owner of the adjoining close to excavate up to the plaintiffs' line and below the bottom line of the plaintiffs' wall, as was done, I

think the cases tend strongly to establish such right under the circumstances in question. If it turned upon the allegation of negligence, admitting the right in the abstract, the evidence failed to show it, in my view of the case. I think the declaration sufficient in arrest of judgment. Being possessed of a warehouse, the plaintiffs were possessed of the ground on which it stood; and if not, the excavation complained of, nevertheless did, by weakening its foundations, cause the fall of the wall of the plaintiffs' building.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

CALVIN & COOK v. MCPHERSON & CRANE.

To a declaration in assumpsit for a breach of contract, the defendants pleaded in bar that certain differences having arisen between plaintiffs and defendants, such differences were referred to arbitration, and that the arbitrator made his award concerning the same, but the plea did not state the differences submitted and those which formed the ground of the present action were identical,—*Held*, bad on special demurrer, for not so doing.

Declaration, 11th of May, 1853, states that heretofore, to wit, on the 1st day of January 1850, in consideration that plaintiffs, at the request of defendants, had demised and leased unto defendants certain lands, tenements, &c., to wit, ten houses, ten outhouses and ten *sheds*, situate, &c., for the period of two years from thence next ensuing, at the rent of £100 per year, the defendants then promised the plaintiffs to deliver up the same to them at the expiration of the said term, *in as good order* as the same were in at the time of the defendants' receiving the same as aforesaid; and plaintiffs aver that they, at the time of making the said promise, did deliver to defendants possession of the said lands, tenements, &c., and defendants did then enter into and upon the same, and did, until the same were destroyed as hereinafter mentioned, hold and enjoy the same upon the terms aforesaid, and that the said *sheds* were of great value, to wit, of the value of five hundred pounds.

And plaintiffs further say that after the making of the said promises, and before the expiration of the said two years, and while defendants so occupied the said *sheds* as

aforesaid, to wit, on &c., the same were greatly damaged, injured and destroyed by fire, and so defendants did not at or before the expiration of the said term of two years, or at any other time, deliver up the same or any part thereof to the plaintiffs, in as good order as the same were in at the said time at which the defendants so received possession thereof as aforesaid. And the plaintiffs further say, that the said *sheds* being of the value of £500 were not nor was either of them delivered up or returned to the plaintiffs in as good order as aforesaid, to plaintiffs' damage of five hundred pounds, and therefore they bring suit.

Pleas.—1st, Non assumpsit and issue. 2nd, That after the making of the said promise in the declaration mentioned, and before suit &c., to wit, on &c., *certain differences having arisen* and being then pending respecting the said promise between the plaintiffs and defendants, they mutually submitted themselves to refer and did then refer the said matter in difference to the award, order and arbitrament of Thomas Kirkpatrick of Kingston, Esquire, barrister at law, and agreed that his decision should be final, so as it should be made within a reasonable time thereafter, ready to be delivered &c. And defendants further say, that afterwards, to wit, on the day aforesaid, in consideration that defendants had then promised to perform and fulfil the said award in all things on their part &c., the plaintiffs then promised the defendants to perform and fulfil the said award in all things on their part &c. And defendants further say, that the said Thomas Kirkpatrick having taken upon himself the burden of the said arbitration, and having considered &c. the matters in dispute &c., did afterwards and within a reasonable time, to wit, on &c., make and publish his award in writing under his hand, ready to be delivered &c., and did thereby award *of and concerning the said matters in difference* herein referred to, as follows: "The agreement respecting the *sheds* and *barges* is evidently not drawn by a professional man, and a reasonable construction must therefore be put upon the several parts of it upon which the points in dispute now arise. First—If a regular lease had been drawn, would the tenants have consented to keep the sheds in repair and to rebuild them in case of their

destruction by fire or the elements? I think not; they certainly would have excepted such accidents: and I think that the agreement amounts to no more than a promise to take ordinary care of them, and evidently was intended to apply specially to the barges, of which the charterers were to be the insurers. I think, therefore, that McPherson & Crane are not liable to rebuild the sheds destroyed by the storm" (*quære* fire). And, as the defendants say that in and by means of the said submission and award they are wholly released and discharged from the performance of the promise in the declaration mentioned, and from all liability to plaintiffs in respect thereof, as by said award, reference being thereunto had, will more fully appear. Concluding with a verification.

Demurrer to second plea, on the ground that it does not therein or thereby appear with sufficient certainty that the differences alleged to have arisen between the said parties, and to have been referred to Kirkpatrick, were in anywise connected with the subject matter of this suit; and also, for that it is not shewn by said plea what were the differences so referred.

The demurrer was argued during this present term.

Eccles, for the demurrer, contended that the plea was bad, as not stating that the matters complained of in plaintiffs' breach were referred to arbitration; it merely stating that the promise was referred to, which is insufficient.

Vankoughnet, Q. C., against the demurrer, contended that the legal construction of a document can be referred to arbitration; the promise averred in the declaration is to give up the buildings in good repair; that the differences respecting the said promise were referred.—*Allen v. Melvin*, 2 C. J. 47; *Gascoigne v. Edwards*, 1 Y. J. 19; *Edwards v. Baugh*, 11 M. & W. 641.

Eccles, in reply—that a person setting up an award must shew the submission; that the submission shews that the matters in difference were referred, and not the promise; that there ought to be an express averment that the matters in difference in this suit were the matters referred.

MACAULAY, C. J.—That questions of law may be referred to arbitration—See 6 Vez. 281, 9 Vez. 364, 1 Dow N. S.

679, Price v. Hollis (1 M & S. 105), Fuller v. Fenwick (3 C. B. 705), Evans v. Pratt (3 M. & S. 759).

If the declaration—is good and it has not been excepted to—the plea is, I think, bad for the first cause of demurrer specially assigned.

The plea merely states that before this suit differences had arisen respecting the said *promise* (that is, to deliver up the premises at the end of the term of two years in as good order as received) the said matters in difference were submitted to Mr. Kirkpatrick, who awarded as set out in the plea. In it he places his construction upon the promise *pro hac vice*, and exonerates the defendants from liability to rebuild the *sheds* destroyed by the storm or fire, whichever it was. All that might have happened on another occasion, and before the event which forms the ground of this action; and if so—and the arbitrator's construction is supposed to have barred the plaintiff generally as to the legal construction of the promise in question—it ought to have been more distinctly stated, or have been shewn that the alleged breach of contract which formed the ground of this action and the differences referred to in the plea were identical: consistently with all that appears, they may have been quite different matters of difference.

The award is pleaded in bar of the action and virtually as an estoppel, and should be more certain than it is—Russell on Arbitrators, 502.

The *promise* stated in the declaration is an express one to do what was promised prospectively, and susceptible of distinct or several breaches, not one implied by law as upon an executed consideration.

The submission stated is not alleged to have been general of all matters in difference, but of some certain differences not explained, and it is not therefore like cases of general submissions, and especially not like the submissions of differences after breach of an implied promise, necessarily relating to the same subject matter—Com. Dig. Award D., Ba. Ab. Arbitrament G.

McLEAN, J., and RICHARDS, J., concurred.

Judgment for demurrer.

GROFF V. BRICKER.

Declaration for slander averred that before and at the time of the committing of the grievances afterwards mentioned defendant used the words "*Old Groff made false writings*," to express, and meaning and being understood to mean by those who heard them, that the plaintiff made, forged and counterfeited writings, and was guilty of the crime of forgery; yet defendant, maliciously intending it to be supposed and believed that plaintiff was guilty of forgery, &c., in a certain discourse published of and concerning plaintiff, the false, malicious, &c., words "*Old Groff made false writings*," meaning forged and counterfeited writings in the sense and meaning in which they were so used by defendant.

Held, good on demurrer, as shewing a good cause of action against defendant for accusing plaintiff of the crime of forgery, &c.

Writ issued 8th September 1853. Declaration, 1st October 1853. Case for slander.

Declaration stated that whereas plaintiff, before and at the time of the committing the grievances hereinafter mentioned, was a person of good name, credit, &c., and deservedly enjoyed the esteem and good opinion, &c.; of all his neighbours and other persons, and had not ever been guilty of forging, robbery, imposition or deceit, &c., and that whereas, before and at the time of the committing the grievances hereinafter mentioned, the defendant used the words "*the two notes you hold against your sons is false*," for the purpose of expressing and meaning, and the said words so used, &c., were by divers, to wit, all the persons in whose presence and hearing the said words were so spoken and published by the defendant, as hereinafter mentioned, understood as expressing and meaning that the said notes were falsely forged and counterfeited by the plaintiff; the defendant then also used the words "*Old Groff made false writings*," for the purpose of expressing and meaning, and the said words last mentioned so used by him were by divers, to wit, all the persons in whose presence and hearing the said last mentioned words were spoken and published by the defendant, as hereinafter mentioned, understood as expressing and meaning that the plaintiff made, forged and counterfeited writings, and was guilty of the crime of forgery. Yet defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, and to cause it to be suspected

and believed that the plaintiff was guilty of *forgery, robbing, &c.*, heretofore, to wit, on, &c., in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning the several matters and premises aforesaid, in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the several matters and premises aforesaid, in the sense and meaning aforesaid, the false, scandalous, &c., words following, that is to say, "*Old Groff* (meaning the plaintiff) *made false writings*," meaning, forged and counterfeited writings, and that the plaintiff was guilty of forgery in the sense and meaning in which those words were so spoken by defendant, as aforesaid; "*he* (meaning the plaintiff) *forged a receipt on a dead corpse*;" "*he* (plaintiff) *cheated his son Isaac's estate out of a thousand dollars*;" "*he* (meaning the plaintiff) *robbed the poor fatherless children and orphans, and I* (meaning the defendant) *can prove it*;" "*Groff* (meaning the plaintiff) *has put in a false account*;" "*Groff* (meaning the plaintiff) *has given a false witness*;" thereby meaning that the said plaintiff had been and then was guilty of the crime of forgery, and had forged a receipt against his son, Isaac Groff, for the payment of money due by the said plaintiff to the said Isaac Groff, his son, and had thereby fraudulently withheld money which would have gone to the children of said son Isaac.

2nd count states that the defendant also heretofore, to wit, on, &c., in a certain discourse, &c., in the presence and hearing of divers persons, then falsely and maliciously of and concerning plaintiff, and of and concerning the matters, &c., other false, &c., words spoke, that is to say, "*the two notes you* (meaning plaintiff) *hold against your sons is false*" (meaning that said notes were forged and counterfeited by plaintiff.)

The plaintiff then assigns general damage; and specially, that by reason thereof, the plaintiff being a member of the religious sect called the Menonists, was expelled from the said religious society of Menonists, and has continued so expelled from that day to this suit; and divers,

to wit, two members of said society, refused and declined to associate with plaintiff, whereby plaintiff hath been deprived of the benefit and advantage of said society, which he otherwise might have had, and hath also been and is otherwise much injured ; to the plaintiff's damage of four hundred pounds ; and therefore he brings suit.

Demurrer to first count, on the grounds—1st. That there is no inducement shewing that plaintiff's sons had made notes in his favor, or that he held notes against his sons.

2nd. That there are no notes mentioned to which the words "the two notes you hold against your sons is false" can be referred.

3rd. That there is no inducement that there was any writing made to the plaintiff, and to which the defendant referred the words "Old Groff made false writing," or any writing with respect to which the crime of forging could be connected with the innuendo ; that the defendant, by those words, imported that the plaintiff was guilty of forging is too large.

4th. That the words "*he forged a receipt on a dead corpse*" are not in themselves actionable, as they do not impute any crime and are insensible and unintelligible without explanation, and there is no innuendo to explain the same.

5th. That the words "he cheated Isaac his son's estate out of a thousand dollars," and "he robbed the poor fatherless children and orphans, and I can prove it," are not actionable ; they do not impute a crime, and the intent in which the word robbed is used repels the sense of highway or other criminal robbery, and, without an innuendo to explain their meaning are insensible and unintelligible.

6th. That the words "Groff has put in a false account," and "Groff has given a false witness," are not actionable, without an inducement and innuendo of circumstances to make them so.

7th. That the allegation at the end of the said first count, following the statement of the slander, and therein used by way of innuendo, is uncertain and indefinite : that the statement does not shew by which of the words the defendant

intended to impute that the plaintiff was guilty of forgery, and had forged a receipt against his son Isaac Groff, for the payment of money due by the plaintiff to the said Isaac Groff his son, and thereby fraudulently withheld monies which would have gone to the children of his said son Isaac.

8th. That there is no inducement in the said first count to warrant the said innuendo, nor is there any allegation that the words charged were spoken of the said two notes, or of the said writings.

A *nolle prosequi* was entered as to the second count.

The demurrer was argued during this term, by *Freeman* for plaintiff, and *M. C. Cameron* for defendant.

MACAULAY, C. J.—The declaration, restricted to the first count, in effect states by way of inducement, that before and at the time of the committing the grievances afterwards mentioned, defendant used the words “*old Groff made false writings*,” to express, and meaning and being understood to mean by those who heard them, as afterwards mentioned, that the plaintiff made, forged and counterfeited writings, and was guilty of the crime of forging; yet defendant, maliciously intending to cause it to be supposed and believed that the plaintiff was guilty of forgery, robbery, fraud, imposition and deceit, on, to wit, &c., in a certain discourse which defendant then had of and concerning plaintiff, and of and concerning the matters and premises aforesaid, in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning plaintiff, and of and concerning the matters and premises aforesaid, in the sense and meaning aforesaid, the false, malicious and defamatory words following: “He ‘old Groff’ (plaintiff) made false writings” meaning forged and counterfeited writings, and that the plaintiff was guilty of the crime of forgery in the sense and meaning in which these words were so used by defendant, as aforesaid; “he (plaintiff) forged a receipt on a dead corpse;” “he (plaintiff) robbed the poor fatherless children and orphans, and I (defendant) can prove it;” “Groff (plaintiff)

has put in a false account ;” “ Groff (plaintiff) has given a false witness ;” thereby meaning that plaintiff had been and was guilty of the crime of forging, and had forged a receipt. All that follows by way of innuendo respecting his son Isaac may be rejected as an unauthorised amplification of the words laid and inadmissible by way of innuendo, without an inducement to warrant it.

The plaintiff then states general damage, and specially that by reason thereof the plaintiff, being a member of the religious sect called Menonists, was afterwards expelled therefrom and so kept excluded, and two certain persons named had declined associating with him in religious worship, or to deal with him, whereby he lost the hospitality, &c., he would otherwise have enjoyed.

It appears to me that the first count sufficiently shows a good cause of action against the defendant, for accusing the plaintiff of the crime of forgery in reference to the words “ *old Groff made false writing.*”

The case of Tozer v. Merton (6 Ex. R. 539), seems to warrant the inducement, as well as the case of McGregor v. Gregory (11 M. & W. 287).

It is unnecessary to consider the words “ he forged a receipt on a dead corpse,” which I think bear a like import ; and of the words “ he robbed the poor fatherless children and orphans,” which are rendered equivocal by what was said immediately before (see declaration), independently of the sense in which such words may be understood as imputing fraud or robbery in the colloquial sense of the term.

The first count containing a good cause of action, the judgment must be against the demurrer and for the plaintiff.

As to special damage, see Ch. Jur. Forms, 561, and notes.

The addition of special damage without a previous inducement is not excepted to on this demurrer, and it tends to aid the declaration if it fall short of sufficiently shewing words amounting to a criminal charge. I do not wish to be understood as expressing the opinion that a special inducement was necessary to justify the special damages laid ; although in some cases of words not other-

wise actionable, as words spoken in reference to professions, trades, &c., such inducement is necessary unless included in the words themselves.

McLEAN, J., and RICHARDS, J., concurred.

Judgment against the demurrer.

MELVILLE V. CARPENTER ET AL.

Declaration—Pleading.

Where several breaches are assigned in a declaration, to which there is a demurrer, if any breach is well assigned, the plaintiff is entitled to judgment as to that breach.

Plea—That before the time limited for the completion of the work, &c. had expired, plaintiff required certain alterations and variations, which said alterations, variations, and additions were made by defendants, and defendants were thereby delayed and hindered from the performance of the work within the time limited. The plaintiff in his declaration having alleged certain alterations and variations, but not in delay of the work, the plea was held bad, as attempting to alter the terms of the covenant declared on by matter subsequent to the sealing of the covenant not under seal.

Breach—That neither was the work done and performed, nor were the said materials, to the satisfaction of the architect named in the agreement.

Plea—That plaintiff himself superintended, &c., and that *certain* of the work performed, and *certain* of the materials provided by defendants under the superintendence of plaintiff, were subsequently disapproved of by the architect. Held bad, as professing to answer the whole breach, but pleading only to a part not specified or defined.

Writ issued 29th January, 1853; declaration 8th September, 1853.

COVENANT, that whereas heretofore, to wit, on the 11th of June, 1851, by certain articles of agreement then made by and between plaintiff of the first part and defendants of the second part, of which profert is made, sealed with the respective seals of the defendants,—defendants, for the considerations thereafter mentioned, did covenant and agree with the plaintiff that they would, at their own proper costs and charges, on or before the 15th day of July, 1852, in a good and workmanlike manner, and to the best of their art and skill, perform and completely finish all the *carpenters' and joiners'* work necessary to be done in and about a certain building, according to the specifications unto said articles of agreement annexed, and the plan, &c., which are incorporated with and made part of said agreement; and should and would roof in and *enclose* the said house on or before the 1st of December then next; and would,

subject to the agreement thereafter mentioned, find all the necessary timber, hardware, and materials requisite for the same, and would perform the said work to the satisfaction and under the superintendence of Albert H. Hills, therein described as A. H. Hills; and it was further agreed that the said specification was intended to contain the full particulars of the work necessary to be done in and about said building, and that if anything had been therein accidentally omitted, the same should, on the direction of the said A. H. Hills, be supplied, and no extra charge should be made for supplying said deficiency, nor should there be any charge for extra work unless ordered in writing by the said A. H. Hills, and in his opinion extra work; and that if any alteration or deviation should be made from said contract, plan, or specification, such alteration or deviation should not vitiate said contract, but defendants should, in the event of such alteration being attended with more expense, be entitled to receive such additional sum as in the opinion of said A. H. Hills should be a reasonable compensation; and if such alteration, &c., should be attended with less expense, then plaintiff should be at liberty to deduct from the contract price the difference; and it was thereby further agreed that if defendants should be guilty of any delay in the performing and finishing the said work, they should forfeit and pay to the plaintiff the sum of one pound for every day for which said work remained unfinished after the 15th of July, 1852, the same to be deducted from the contract price; or that plaintiff should at his discretion, in case of delay after notice, and after defendants not proceeding to complete said work, after such notice employ workmen to complete said work, and to deduct or retain all moneys and expenses paid and incurred in the completion of said work; and plaintiff did agree to pay defendants for said work the sum of £490, as follows: to convey to defendants, their heirs and assigns, on the completion of said work, certain lots of land, and the balance remaining due above the value of said land, as follows—that is to say, two-thirds thereof—

in payments, according to the certificate of A. H. Hills, and the remaining one-third on the completion of the said work; and that plaintiff should have the option of furnishing materials, &c., charging the usual market prices, and that the same should be considered as cash and deducted from the contract price.

The plaintiff then avers performance of all things on his part to be performed, and that he was ready, &c., to convey said land and to pay the money according to the terms of said agreement, and then for breach says that, although defendants did commence said work and performed a considerable portion thereof, and although the period limited for the finishing and completing said work had elapsed long before suit, the defendants did not finish or complete the said work within the period so limited and appointed, but, on the contrary thereof, they did not finish or complete the said work until long after the period so limited and appointed—to wit, *until* and upon the 1st of January, 1853.

That the said work which the defendants did and performed, and the materials which they found and used in and about the same, were not respectively of the nature, description, or quality mentioned and required in and by said articles of agreement, plan, and specification; but, on the contrary thereof, said work was done, &c., in a bad and unworkmanlike manner, and the materials were of a bad and indifferent quality, and that neither was the said work done, nor were the said materials to the satisfaction of said A. H. Hills, the architect named in said articles of agreement, plan, and specifications.

Plaintiff then avers that, although he did in some respects alter the manner in which said work was to be done, yet by such alteration the defendants were not delayed, nor did such alterations increase the expense of said work; and plaintiff says that by reason of the delay, &c., and non-completion of said work within the time aforesaid, the defendants forfeited, at the rate of one pound for each day beyond the said period, a large sum of money, to wit, &c.; and that by reason of the work having been done and the materials furnished in manner aforesaid, the said work and materials

became of little or no use to plaintiff; and plaintiff saith that defendants have broken the said articles of agreement, &c., to plaintiff's damage, &c.

Second plea to first breach—That during the time in declaration mentioned, and while said work was being performed, and before the expiration of the time limited, plaintiff caused and required certain alterations, &c., from said plan and specifications, and certain additions thereto, to be made by the defendants to a great extent and to a large amount in value, to wit, &c., over the contract price, which said alterations, variations, and additions the defendants accordingly made, and were thereby hindered in the performance of the said work by the time within which they would otherwise have been able, and were required, and would have performed and completed it, for a considerable length of time after the period limited and appointed, to wit, until, &c.; concluding with a verification.

10th plea.—As to the third breach—that plaintiff did not procure nor permit the superintendence of said A. H. Hills during the progress of said work by defendants, but on the contrary superintended a great part thereof himself, requiring the same to be done according to his orders and wishes; and defendants say that certain of the work so performed, and certain of the materials provided by them during the absence of the said architect, and under the superintendence and direction of plaintiff, were subsequently seen and examined by said architect and were disapproved of by him, and in those respects the said work and materials were not to the satisfaction of the architect, as in said third breach alleged; and defendants say, that being satisfied thereof, to wit, on, &c., they (defendants) were proceeding and desiring then immediately to remedy the same, and to make the work and materials satisfactory, and to amend the same, &c., were then and have ever since been prevented by the plaintiff from so doing, and could not therefore perform the said work and provide the materials to the satisfaction of the said architect; concluding with a verification.

Replication to second plea—That, notwithstanding the

alterations and variations in that plea mentioned, the defendants were not thereby necessarily delayed or hindered beyond the time in said articles of agreement limited for the completion of the said work, *modo et forma*, alleged ; concluding to the country.

Demurrer to tenth plea, on the grounds—1st. That said plea professes to answer all that the plaintiff complains of in the third breach of his declaration, but does in fact furnish an answer to a part only of such breach, by admitting and attempting to excuse said breach as to a part only of the said work done and materials provided. 2nd. That, having admitted the said breach as to such parts, the said plea does not sufficiently excuse or justify the same. 3rd. That the said plea is repugnant and inconsistent in, firstly, alleging that the plaintiff did not permit the superintendence of the said architect, and, secondly, that the said architect disapproved of the said work and materials so far as the same had been done and provided ; and, also, that it is not shown in and by said plea at what time or times the plaintiff did not permit the superintendence of the said architect, or that he actually refused to permit the same, or that they required the same ; nor is it shown that the architect was prevented by plaintiff from inspecting the said work and materials, or whether or not he did inspect and approve or disapprove of the same.

Demurrer to replication to second plea, on the grounds—1st. That it is too narrow, and the plaintiff thereby seeks to limit the defendants in their proofs to alterations and deviations, whereas the allegation in said second plea is, that defendants were delayed by alterations, deviations, and *additions* to said work in that plea mentioned,—that there is no proposition affirmed on the one side and denied on the other, and yet said replication concludes to the country, and that no certain issue can be taken thereon. 2nd. That the said traverse is indirect and argumentative in this, that it does not appear whether or not plaintiff intends to deny the fact of defendants' being delayed by additional work or not,—that the same is uncertain, the said traverse being in the conjunctive.

Notice was given of exceptions to the declaration on general demurrer, and notice of exceptions to the second plea on general demurrer was also given.

As to the declaration—that in and by the said declaration it appears that plaintiff has no cause of action in regard to the first breach therein alleged in particular, in this, that it is stated in the said declaration as part of the agreement in that behalf that the sum of one pound per day, to be forfeited in case the said work remained unfinished after the time for the completion thereof had expired, should be deducted from the contract price, nor is it alleged that the same is *unsatisfied*; that if plaintiff has not deducted the same, but paid the whole of the contract price, he has received his right term therefor; that it cannot be determined by the agreement, as set out in the declaration, whether the said forfeiture of one pound per day was to apply to delay in completing the original contract work or the work substituted in case of deviation from the original contract work; that the time during which the said forfeiture was to accrue is not stated positively.

As to the second plea—1st. That the defendants thereby attempt to alter or vary the terms of the covenant declared on by matter subsequent to the sealing of the said covenant not under seal, nor otherwise sufficient for that purpose. 2nd. And that they also attempt to excuse the delay complained of in and by the first breach of the declaration by shewing that alterations, variations, and *additional* work were the cause of such delay, such excuse being wholly insufficient in law; and for that, also, the work, in the performance of which the defendants have attempted to excuse the delay, does not appear to be the same work in the first breach of the declaration mentioned.

The demurrers were argued during this present term.

On the argument, *Eccles*, for plaintiff, contended that the plaintiff has a right to deduct the forfeiture, or to recover it by cross action, or plead it as a set off.—*Clark v. Gray*, 6 East. 564, 2 Chitty's Pldg. Pleas, note 9.

As to the second plea, that it is clearly no answer to the action that defendants were bound to do the work by a

certain day, and by the terms of the contract all additions and variations within the time specified. That the plaintiff made alterations is no answer; they were not bound to make any unreasonable alterations, and the architect was the person who was to decide on the reasonableness, and who decided the alterations were reasonable; or if not, it should have been pleaded.

That the covenant being to complete whatever was omitted by a certain time, they were bound to have it done by that time; and therefore the plea no answer.—Chitty on Contracts, 112; Littler v. Holland, 3 T. R. 590; Ritchie v. Bank of Montreal, 4 U. C. Q. B. R. 459.

That if the work was done under the contract, it was provided for; and if not done under the contract, it is no answer.

That the replication is good; it traverses all that is material: that that part of the plea which applies to the additions is not material. Again, that additions are alterations or variations from the plan, and are provided for by the contract.

As to the tenth plea, it states that a *certain* portion of the work and materials were not to the satisfaction of the architect, and that defendants were going to make them good to the satisfaction of the architect, but were prevented by plaintiff; whereas the plaintiff's last breach is, that the whole of the work and materials were not to the satisfaction of the architect; and therefore the plea no answer.

It is also bad on the other grounds of special demurrer.

It says, plaintiff would not permit the architect to superintend, and afterwards states that he disapproved of some of the work, and is therefore inconsistent and double.

Connor, Q.C., for defendants, contended that there is a great distinction between this case and the case of *Duckworth v. Alison*, 1 M. & W. 412; in that case the plaintiff had paid the amount of the contract price, and of course could sue.

That the plaintiff ought to shew with greater certainty for how many days the forfeiture is claimed.—*Worthington v. Municipality of Haldimand*, 10 U. C. Q. B. R., 221.

That the case of *Watson v. O'Bierne*, 7 U. C. Q. B. R., 345, shews that the person increasing the work and labour cannot sue for the non-completion of the contract in time.

That the cases of *West v. Blakeway*, 2 M. & G. 729, and *Gwynne v. Grainger*, 1 M. & G. 857, shew that a parol agreement can be set up to extend the time for the completing a contract under seal, and that an act of the plaintiff by a material addition makes the case much stronger. He cited *Holme v. Guppy*, 3 M. & W., 389; *Rawlinson v. Clarke*, 14 M. & W., 191.

That the second plea is sufficient, and cannot at all events be bad as general demurrer.

As to the replication, that alterations and variations do not include additions.—*Watson v. O'Bierne*, 7 U. C. Q. B. R., 345; *Alsager v. Currie*, 11 M. & W. 14; *Stubbs v. Lainson*, 1 M. & W., 726.

As to the tenth plea, that the averment in the breach is a general one, and the defendants narrow it, and the plaintiff should have new assigned.—*Rogers v. Custance*, 1 Q. B. 77; *West v. Blakeway*, 2 M. & G. 727.

MACAULAY, C. J.—1st. As to the declaration. Upon general demurrer to the whole declaration containing only one count, it may be questioned whether the plaintiff is not entitled to judgment if there be one good breach and cause of action shewn therein.—*Duppa v. Mayo* (1 Saund. 285), *Yates v. Tearle* (6 Q. B. 285), *Briscoe v. Hill* (10 M. & W. 735, 1 M. & G. 201), *Slade v. Hawley* (13 M. & W. 761), *Price v. Williams*, (1 M. & W. 6), *Boydell v. Jones* (4 M. & W. 451), *Ferguson v. Mitchell* (2 C. M. & R. 687), *Webb v. Baker* (7 A. & E. 841).

Taking the objections distributively, the cases seem to shew that the plaintiff may sue in covenant for the penalty of one pound per day.—*Duckworth v. Alison* (1 M. & W. 412), *Holme v. Guppy* (3 M. & W. 389), *Hamilton v. Raymond* (2 U. C. C. P. R. 392), *Worthington v. Municipality of Haldimand* (10 U. C. Q. B. R. 217).—1st. It does not appear in the declaration that the plaintiff has paid the whole price to the defendants—indeed the contrary

is implied, for he only avers *readiness* to convey the land and make the payments agreed to be made, and payment or satisfaction if made would rather seem matter of defence if a bar to the action in the present form. 2nd. It does not appear the plaintiff has deducted the penalties from the price, or that he has paid the whole or any part thereof. 3rd. I think the declaration clearly relates to delay in completing both the original work agreed to be performed and the deviations directed during its progress, all of which the defendants undertook to perform by the day, &c. 4th. Time is sufficiently alleged on general demurrer.—*Worthington v. Municipality of Haldimand* (10 U. C. Q. B. R. 221), *Gilmour v. Hall* (ib. 309), *Fletcher v. Dyche* (2 T. R. 32).—5th. The number of days during which the penalty of one pound daily had accrued is not averred, but it is nevertheless sufficiently stated on general demurrer: it mentions the day on which the work was to be completed—viz., the 15th of July, 1852,—and alleges default and non-completion until, to wit, the 1st of January 1853, and that for such delay the forfeitures amounted to £150, which they might within the period.

The second plea states alterations, variations, and additions to a large amount in value, and in addition to the contract price; not merely alterations or deviations within it. It does not say in addition to the contract *work*, but *price*. I think the main work sufficiently appears to be that mentioned in the declaration.—*Holme v. Guppy* (3 M. & W. 387), *Watson v. O'Bierne* (7 U. C. Q. B. R. 345), *Harris v. Goodwin* (2 M. & G. 417, 3 Scott N. R. 199), *West v. Blakeway* (2 M. & G. 729-49-50, 6 Eng. R. 236), *Gwynne v. Davy* (1 M. & G. 859, 5 Vin. Ab. Cond. M. 242), *Doe dem Muston v. Gladwin* (6 Q. B. 953), *Rawlinson v. Clarke* (14 M. & W. 187-9), *Wood v. Leadbitter* (13 M. & W. 837-855).

The plea seems bad on the first ground of exceptions. The plaintiff in his declaration alleges certain variations or alterations, but not in delay of the work, and the plea takes no notice thereof, nor does it shew that they were required

to do or did anything that they were not bound by the contract to perform and for which it expressly provided.

It does not state nor does it appear that the plaintiff obstructed, hindered, or prevented the defendants executing the work, nor do I see they were bound to undertake and execute deviations that would necessarily prevent their completing the work by the day appointed. It is, moreover, open to the objection of attempting to supersede the covenant by the subsequent verbal directions of the plaintiff, contrary to the decisions on this head.—See *Harris v. Goodwin* (2 M. & G. 417), *West v. Blakeway* (ib. 729), and other cases cited. As to the replication see *Alsager v. Currie* (11 M. & W. 14), *Stubbs v. Lainson* (1 M. & W. 728, 1 Saund. 268, 312).—If the plea were good, I think the replication would be bad, as not fully answering the whole plea as it professes to do.

As to the 10th plea, bad: it does not answer the breach. It appears to me the plea applies to the second, not the third breach, or only to a part of the second breach, calling it the third. The second breach seems to begin at the words “that the said work,” and to end with “specifications;” whereas the plea applies only to the latter part, asserting that the work was not to the satisfaction of Hills, the architect. The first cause of demurrer seems well founded. The plaintiff complains of the insufficiency of all the materials and work; the plea, professing to answer the whole breach, is pleaded to part only, not specified or defined. It seems to me insufficient for the other causes of demurrer specially assigned.

McLEAN, J., and RICHARDS, J., concurred.

Judgment accordingly.

MURRAY V. MOUNTJOY ET AL.

Plea—That H. was the holder of the note when the same became due; and that while he was holder; and before said note was endorsed to plaintiff, and before suit, H. and defendants had divers accounts depending between them, and an account was then had and settled between them, such accounts including the promissory note in declaration mentioned; and that said H. had credit in such account for the amount of said promissory note; and that defendants upon such accounting were ascertained to be indebted to said H. in £54 4s. 9d.; and said H. being indebted to J. C. & Co. in £106, it was agreed between H. & J. C., a partner of said firm of C. & Co., that said H. should assign the amount so due from defendants to H. unto said J. C. in part payment of the debt due to said C. & Co.; and it was agreed between said H., defendants, and said J. C. that said amount so due by defendants to H. should be paid by defendants to J. C. for and in account of C. & Co.'s debt, and that H. should have no claim or right against defendants; and that H., with defendants' consent, did assign unto said J. C. the said amount so ascertained to be due from defendants to H., and did discharge the defendants from their liability to him; and defendants, in consideration of being so discharged, promised to pay J. C. said amount; and said J. C., on behalf of C. & Co., did agree to hold defendants liable to said C. & Co. for the amount so assigned and to discharge said H., whereby defendants became relieved from their indebtedness to said H.; and that after such assignment said note remained in hands of said H. without consideration until plaintiff took same, and the endorsement thereof by said H. was in violation of good faith, and without consent of defendants or J. C.; and that said note was endorsed to plaintiff, and he took same long after same became due, and after said amount so ascertained to be due from defendants to H. had been assigned, with full notice of the premises.

Held bad—1st. For not shewing the christian names of said C. & Co., or alleging an excuse for not doing so. 2nd. That it cannot be presumed that Messrs. C. & Co. is the name of one person; therefore defendants should have set out their names in full. 3rd. It does not appear that H. was indebted to J. C. in his private capacity, and if he acted on behalf of C. & Co. it does not appear, and the promise is made by defendants to him alone. 4th. And as being double.

Writ issued 23rd of March, 1853; declaration 31st of March, 1853.

Assumpsit on promissory note by holder against makers.

Pleas—1st. *Non-fecit*. 2nd. That Hall, the payee, did not endorse. 3rd. That said Hall was the holder of the note when the same became due and payable; and that whilst he was the holder of the said promissory note, and before the said note was endorsed to the plaintiff, and before the commencement of this suit, to wit, on, &c., the said John Hall and the defendants had divers accounts depending between them, and were respectively indebted to each other, and an account was then had and settled between them respectively, such accounts and debts including the said promissory note; and the said John Hall then had

credit in such account for the full amount of the moneys then due and claimable upon and in respect of the said note. And the defendants say that upon such accounting and settlement of the said mutual debts and accounts, including the said promissory note, between the said John Hall and the defendants as aforesaid, it was found and ascertained that the said defendants were indebted to the said John Hall in a certain amount or balance—to wit, the sum of fifty-four pounds four shillings and nine pence. And the said John Hall being afterwards—to wit, on, &c.—indebted to Mr. James Crombie and Company, of, &c., in a large sum of money—to wit, the sum of one hundred and six pounds—it was thereupon agreed by and between the said John Hall, the said defendants, and one James Crombie, a partner in the said firm of Crombie and Company, that the said John Hall should assign the said amount or balance unto the said James Crombie in part payment of the said debt so due by the said John Hall to the said Crombie and Company; and it was then and there agreed between said John Hall, the defendants, and the said James Crombie that the said balance or amount so ascertained to be due by the said defendants to the said John Hall should be paid by the said defendants to the said James Crombie, for and on account of the debt so due by the said John Hall to the said Crombie and Company; and that the said John Hall should have no further claim or right thereto against the said defendants or otherwise howsoever. And the defendants further say that in pursuance of the said agreement, and with their the said defendants' knowledge and consent, he the said John Hall did then—to wit, on, &c.—assign and make over unto the said James Crombie the said balance or accounts so ascertained as aforesaid to be due by the said defendants to him the said John Hall, upon the said accounting of the said mutual debts and accounts of the said John Hall and the defendants, including the said promissory note, and did then assign and relinquish unto the said James Crombie all his right to the said balance or account so ascertained as aforesaid, and did discharge the said defendants from their liability to him

in respect thereof; and the said defendants did thereupon, in consideration of their being so discharged, and of the premises, promise to pay the said James Crombie the amount or balance so ascertained as aforesaid. And the said James Crombie did thereupon agree to and with the said John Hall and the defendants, for and on behalf of the said Crombie and Company, to hold the said defendants liable to the said Crombie and Company, instead of the said John Hall, to the amount of the said balance so ascertained as aforesaid, and then assigned and transferred to him, and to discharge the said John Hall from his indebtedness to the said Crombie and Company to the extent of the said balance or amount so ascertained as aforesaid, and so transferred and assigned, and so to be paid by the said defendants to him for the said Crombie and Company on account of their claims against the said John Hall, whereby the said defendants became and are relieved and discharged from their said indebtedness to the said John Hall, and from their liability to pay to him the said amount or balance so ascertained as aforesaid by the said accounting of the said mutual debts and accounts of the said John Hall and the said defendants, including the said promissory note as aforesaid, and became and are liable to pay the same to the said James Crombie for the said Crombie and Company. And the defendants further say that after such assignment and transfer of the said amount or balance so ascertained to be due on the said accounting of the said mutual debts and accounts of the said John Hall and the said defendants, including the said promissory note by the said defendants to the said John Hall, and of the claims or demands of the said John Hall in respect thereof against the said defendants, the said promissory note remained in the hands of the said John Hall without consideration or value, and without the consent of the defendants, until the plaintiff took the same, as after mentioned, and the endorsement thereof by the said John Hall was in violation of good faith and without the consent of the defendants or the said James Crombie. And the said defendants further say that the said note was first endorsed and delivered to the plain-

tiff, and he first took and received the said note long after the same became due and payable according to the tenor and effect thereof, and after the said amount or balance so ascertained as aforesaid by the said accounting of the said mutual debts and accounts of the said John Hall and the defendants, including the said promissory note and the claims or demands of the said John Hall against the said defendants in respect thereof, had been transferred or assigned to the said James Crombie as aforesaid, with full notice of the premises—to wit, on, &c.; and this the defendants are ready to verify, &c.

Issue was joined as to the first and second pleas, demurrer as to the third, on the grounds—1st. That the defendants therein allege that the said John Hall was indebted to Messieurs Crombie and Company, but does not set out or shew the Christian or other names of the said Messieurs Crombie and Company, or aver or shew any excuse for doing so; and the said third plea is therefore bad for uncertainty. 2nd. That it cannot be assumed that Messieurs Crombie and Company is the name of one person, inasmuch as the defendants allege James Crombie to have been a partner of the said firm of Crombie and Company, and therefore the defendants should have set out the names of the said Messieurs Crombie and Company in full, or alleged some excuse for not doing so. 3rd. That the defendants, in order to shew a satisfaction of the promissory note in the declaration mentioned by the defendants to the said John Hall, shew that the said John Hall was indebted to Messieurs Crombie and Company in a greater sum than the defendants were indebted to the said John Hall, and that James Crombie accepted the defendants' promise to pay him the amount of the said note by the consent of the defendants, the said John Hall, and the said James Crombie; whereas it does not appear that the said John Hall was at all indebted to the said James Crombie in his private capacity, and if he acted on the behalf of the said Messieurs Crombie and Company it does not so appear but that he acted on his own behalf; besides which, the promise is made by the defendants to him alone

without the consent of any of the other members of the firm. 4th. That the said plea is double, in this—that it sets out an agreement to shew satisfaction to the said John Hall, and, to make it a defence as to the plaintiff in this action, alleges that the said note was endorsed to the plaintiff long after it became due and payable, and with notice of the facts set out in such plea; whereas, had the defendants set out the said agreement with either one of the said allegations as to the time when the note was endorsed to the plaintiff, and as to his having received notice of the facts, the plea would have constituted a defence.

The demurrer was argued during Trinity term last.

McLean, for demurrer, contended that the third plea was bad on the grounds assigned, citing as to the first objection *Gatty v. Field*, 9 Q. B. 441, S. C. 10 Ju. 980; *Applemans v. Blanche*, 14 M. & W. 154; *Esdaile v. McLean*, 15 M. & W. 277; 2 D. & L. 982; *Walker v. Perkins*, 9 M. 665; 5 U. C. R. Q. B. 152-3.

As to the third objection: That it does not allege an indebtedness to Crombie alone, nor that he was a partner at the time of the arrangement—*Cuxon v. Chadley*, 3 B. & C. 591; *Fairlie v. Denton*, 8 B. & C. 395.

That it sets up an agreement to discharge, not an actual discharge.

Dr. Connor, Q. C., for defendant, said,

It was not assigned as a cause of demurrer that the plea shewed only an agreement to discharge and not a discharge in fact or law.

Nor that the settlement was before note due. That, first, debts may be thus transferred. Second, one of several partners may act for and bind the rest; and third, that the agreement was with Crombie & Co. to pay them.

That there was no want of certainty in the partnership name as used being Crombie & Co. of Galt, thereby identifying the firm, and was not like a blank for the name or nothing specific to identify.

That it was a collateral amount and sufficient for the purpose.—*Levy v. Webb*, 9 Q. B. 427.

That the first and second objections were in effect similar; that the third was immaterial, and as to the fourth, that there was no duplicity in alleging notice, and that the note was overdue, though either might avail as a defence.

McLean, in reply, submitted that the first objection had not been answered or removed. That *Crombie* was not connected by reference as the *said* *Crombie*, and there was manifest uncertainty.

He also relied on the objection of duplicity, as plaintiff could not safely traverse only one of the allegations—of notice, and of the notes being overdue, and could not traverse both without being liable to a demurrer on that ground.

MACAULAY, C. J.—1st. The cases cited by the plaintiff's counsel, and especially those of *Levy v. Webb*, *Gatty v. Field* (9 Q. B. 427 & 431), and *Applemans v. Blanche* (14 M. & W. 154), shew, I think, that the first and second grounds of demurrer must prevail, notwithstanding the cases noted, which determine that intermediate parties to bills of exchange and promissory notes may, in declaring thereon, be described in the partnership name.

Lord Denman, with an evident desire to get over the objection in *Gatty v. Field*, after the Court had taken time to consider, said, "We are of opinion that where omission or substitution (*i. e.*, of initials instead of full names, or of Mr., with surnames, only omitting the christian names) is made, not in the description of some written instrument, but in the statement of a transaction between the parties on which the action turns, it is good ground of special demurrer. Here the plea clearly shews that *James Crombie & Co.* is the name of a partnership firm consisting of more than one person, and I do not think that the facilities afforded for identity by the statement of the place of business of such firm, as in the town of Galt, obviates the objection, or that the present being the use of a partnership name, and not initials or the surnames of individuals only, as in the cases cited, materially distinguishes it from them. It appears to me it comes within the rule and is equally open to the exception of uncertainty and informality of statement—

Miller v. Hay (3 Ex. R. 14). It is not a wrong, but an insufficient, designation of the persons alluded to; and the plea, being had on the face of it, is demurrable.—See Kinnersley v. Knott (7 C. B. 480), Moffatt v. Vance (7 U. C. R. Q. B. 142), Bank U. C. v. Gwynne (ib. 140), City Bank v. Eccles (5 U. C. Q. B. R. 509), Dyall v. Raefish (6 U. C. Q. B. R. 301).

I am much disposed to think that the 4th objection also is a fatal one and that the plea is bad for duplicity.

The plea alleges a transfer of the note to Crombie & Co. or the balance thereof, as included in the account stated; and then proceeds to state that after such account stated, and the assignment of the balance due by the defendants to Hall to Crombie & Co., the plaintiff took the note from Hall *after it was due and with notice*.

Now the account stated between the defendants and Hall is laid on the day the note became due on the face of it—namely the day after its date, but before it was payable, allowing the usual days of grace, and the arrangement between them and Crombie & Co. is laid upon a day long after it was due, but under a *videlicet*. It is not alleged to have been in fact *after* the note became due, and it may in truth have all taken place *before* the note became due and payable.

Then the plea alleges that the plaintiff afterwards received the note as indorsee of Hall *after it became due and with notice* of the premises.

He may in fact have so received it *before* it was due with notice, or after it was due without notice, and in either event the defence would (so far as the admissibility of the special matter as defence went) be sustained.

The plea therefore rests such defence upon two grounds; and although the plaintiff might perhaps put both in issue by a replication of *de injuria*, as by traversing both allegations separately, it is nevertheless open to him to except to the plea for duplicity upon special demurrer.

The third ground of demurrer goes more to the substance of the plea as a defence; though the exception is made to the form of the plea, in stating the arrangement with Crombie

or Crombie & Co. It may be that the facts set forth constitute a valid defence (indeed the contrary has not been contended), and that the agreement, though with Crombie individually, was on behalf of the firm, and may be so stated throughout, or it may be all with Crombie alone; but as it is, it is not so laid uniformly, but some material facts are stated in relation to the firm or company and others in connection with Crombie alone. If it depended upon this objection, it would probably be found bad for uncertainty and inconsistency, but it is not necessary to express a conclusion or opinion upon it.

I am disposed to think all the objections well taken, especially the first and last.

McLEAN, J., and RICHARDS, J., concurred.

GRAHAM V. LESLIE.

Defendant agreed to sell to P. a lot of land, for £150, and gave him a bond for a deed. P. sold to O., who sold to plaintiff, and at his request defendant executed a deed in fee to plaintiff, the consideration therein expressed being £425, with covenants for seizin in fee, &c.

Plaintiff having been dispossessed, in an action on the covenant, *held*, that plaintiff was entitled to recover the full consideration mentioned in the deed from defendant to him.

COVENANT.—Defendant agreed to sell to Prendergrast the north-east half of lot No. 9, in the second concession, Albion, and he gave him a bond for a good deed at £150. Prendergrast sold to Osborne, who sold to plaintiff for £425, and at his request defendant executed a conveyance in fee to plaintiff, the consideration therein expressed and acknowledged to have been received, being £425, with covenants for seizin in fee, &c. The plaintiff claimed £643 16s. 5d., made up of the £425, interest, and the costs of a suit defended at defendant's request, which sum the jury found for plaintiff. £150 was paid in cash when the deed was executed for defendant, the balance of the £425 to be secured by mortgage to Bilton or Osborne. Defendant gave a bond to Bilton at Osborne's request.

The declaration is on the covenant contained in the deed from defendant to plaintiff. Breach—that defendant was not seised in fee, nor had he right to convey; that plaintiff

entered but was ousted by Strong, who had a prior and better title and ejected plaintiff, who was put to large costs, &c.

The only plea is that the said indenture is not defendant's deed; so at the trial it became mere assessment of damages.

At the trial the following documents were put in :

Bond, dated 24th February, 1844—George Leslie to William Prendergrast in £300—recites agreement to sell and buy north-east half of lot No. 4 in second concession Albion, 100 acres, free from incumbrances, for £150, payable in six years by instalments of £25 on 1st of January in each year, the first instalment without interest and the remaining five with interest at six per cent. Condition—if said Prendergrast did so pay, &c.; if said George Leslie, at request of Prendergrast, his heirs or assigns, execute a good and effectual conveyance in law of the fee simple and inheritance of said land to said Prendergrast, his heirs or assigns, *free from all incumbrances &c.*, then &c.

Deed poll, 18th May, 1848,—William Osborne agreed to sell James Graham the east half of lot No. 24 in second concession, Albion, for £425; a good deed, free from all incumbrances, to be given to said James Graham.

Bond, 31st May, 1848, George Leslie to George Bilton, £500, condition on being paid £86 on the 1st January next, to execute to said Bilton, his executors, administrators or assigns, or such person as he or they should desire, a good and sufficient warranty deed in fee simple, &c., of the aforesaid half lot; the deed to contain the usual covenants, and the land to be assigned free from all incumbrances &c.

Indenture of bargain and sale, 31st October, 1848, George Leslie to James Graham, in consideration of £425 to him by said James Graham in hand well and truly paid at or before the sealing and delivery thereof (the receipt whereof is thereby acknowledged,) he did grant, bargain, sell &c., the said half lot to said James Graham, his heirs and assigns for ever, with covenant that said James Leslie was seised in fee, &c., without anything to charge, encumber or defeat the same; that he had a good right to

convey; for quiet enjoyment, free from all incumbrances, and for further assurance.

The covenant for seizin in fee is of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee, of and in the premises, &c., without anything to alter, charge, encumber or defeat the same; and had good right to convey in manner aforesaid. A receipt, endorsed, signed by George Leslie, for the £425.

During this term, *Vankoughnet*, Q. C., obtained a rule to shew cause why the verdict should not be reduced, or for a new trial, as against law and evidence, and for misdirection.

Eccles shewed cause against the rule. He cited *Brennan v. Servis*, 8 U. C. Q. B. R. 191; *Clarke v. Robertson*, 7 U. C. Q. B. R. 370.

Vankoughnet, Q. C., in reply, cited *McKinnon v. Burrows*, 3 U. C. K. B. R. (O. S.)

That the consideration Leslie received was only £150, and that is all they can recover; that he was not bound by the consideration mentioned in the deed, but could shew that he only received £150, which not inconsistent with the deed; that it is laid down that although the consideration for a conveyance be expressed as five shillings, the purchaser could shew that he gave a larger sum, and if a greater why not a less sum; and that the jury might have given a less sum if they thought proper, and that they ought to have been told by the learned judge that the verdict should have been for £150.

MACAULAY, C. J.—I think the plaintiff is entitled to retain the verdict. He purchased in good faith and actually paid the full consideration money mentioned in the deed.

His damages extend that far—at all events, no case decides the contrary. The defendant may have incautiously executed a deed admitting a consideration so far exceeding what he himself received in the first instance. He however did in fulfilment of his bond to Prendergrast and Bilton, to convey to them, their heirs or assigns, free from incumbrances, and in so doing does expressly covenant

with plaintiff that he was seised in fee and had good right to convey, free from incumbrances.

I apprehend, moreover, that as between these two parties the defendant is estopped by his deed from denying the receipt of the sum acknowledged therein to have been paid as the consideration for his coveyance.—*Rountree v. Jacob*, 2 Saun. 141; *Baker v. Dewey*, 1 B. & C. 704; *Lampon v. Cooke*, 5 B. & Al. 606; *Bonner v. Wilkinson*, ib. 682, 1 D. & R. 211; *Graves v. Key*, 3 B. & Ad. 313.

McLEAN, J., and RICHARDS. J., concurred.

Rule discharged.

HILARY TERM, 17 VICTORIA.

Present—HON. JAMES BUCHANAN MACAULAY, C. J.

“ ARCHIBALD McLEAN, J.

“ JOHN BUELL RICHARDS, J.

THE QUEEN V. GEORGE BENJAMIN AND EMANUEL HYMEN BENJAMIN.

Challenge—Indictment.

Upon the trial of a party indicted for misdemeanor, the Crown has the right to cause jurors to stand aside until the whole panel of jurors is gone through.

An indictment charging a misdemeanor against a registrar and his deputy jointly is good, if the facts establish a joint offence.

A deputy is liable to be indicted while the principal legally holds the office, and even after the deputy himself has been dismissed from office.

Indictment—That George Benjamin, on the 9th of March 1852, was, and before was, and still is registrar of and for the County of Hastings, and was so at the time when, &c., and appointed E. H. Benjamin to be his deputy, &c., and that the said E. H. Benjamin continued and was such deputy before and at the time when, &c.

That before the committing the offence afterwards mentioned, and before the date and making of any of the indentures or memorials afterwards mentioned, to wit, on the 6th of August 1852, the tracts and parcels of land

afterwards mentioned were granted in fee by the Queen, by letters patent under the great seal, to Joseph Green, Lewis Green, William Green, Silas Green, and Ira Green, their heirs and assigns, for ever.

That afterwards, by an Indenture dated the 8th of March, 1852, between William Henry Chisholm of the first part, and Elizabeth, his wife, of the second part, and Albert Lewis Smith of the third part, the said W. H. Chisholm, for the considerations therein mentioned, did give, grant, bargain, sell, &c., unto the said A. L. Smith, his heirs and assigns, all, &c., in the village of Rawdon, in the township of Rawdon, being village lot No. 2 on the north side of Front street, and lot No. 2 on the south side of Church street, in the said village of Rawdon, &c., with all houses, &c.; Habendum to the said Smith, his heirs and assigns, for ever, subject to the condition that if the said W. H. Chisholm, his heirs, executors or administrators, did and should well and truly pay to the said A. L. Smith, his executors, administrators or assigns, the sum of £86 7s. 5d., with interest, on the first day of October then next, then the said indenture should be void,; &c. and by which said indenture the said Elizabeth Chisholm barred her dower, &c.

That afterwards, to wit, on the 9th of March, 1852, the said A. L. Smith executed a memorial in writing of the said deed under his hand and seal, and attested by two witnesses, one of whom was a subscribing witness to the said deed, and containing the date of the said deed, the names of parties and witnesses, and the lands, &c.

That Bradshaw being a witness to the said deed and memorial, afterwards—that is, on the 9th March aforesaid—by affidavit on oath before a commissioner of Q. B. &c. proved the said execution of the said deed and memorial, who certified the same as said memorial &c.

That afterwards, and while the said George Benjamin was registrar and the said Emanuel Hymen Benjamin was deputy registrar as aforesaid, to wit, on the 9th March 1852, at &c. the said A. L. Smith did bring to the office of the said George Benjamin, as such registrar as aforesaid, the

said memorial, certified as aforesaid, and the said deed, and did then and there, and while defendants were registrar and deputy as aforesaid, between the hours of 10 A. M. and 3 P. M. in the said office of the said George Benjamin produce to the said George Benjamin, so being such registrar as aforesaid, and to the said Emanuel Hymen Benjamin, so being such lawful deputy as aforesaid, and did then and there in the said office leave in their hands the said memorial &c. and deed, and they were then and there required by the said Smith to enter and register the said memorial according to law, and that the said Smith did then and there, to wit, on the day and at the place aforesaid, pay to the said George Benjamin, registrar, and Emanuel Hymen Benjamin, the sum of, to wit, eleven shillings &c., being the sum then and there asked and required by them as and for the fees for the registration of the said memorial, and which was accepted and received by them, &c.

That while defendants were registrar and deputy as aforesaid, and before the offence afterwards mentioned, at Belleville &c., by another indenture, dated the 11th May 1851, and made between the said William Henry Chisholm of the first part, Elizabeth his wife of the second part, and John A. Chisholm of the third part, the said William Henry Chisholm, for the considerations therein mentioned, did give, grant, bargain, sell, &c. unto the said John A. Chisholm, his heirs and assigns, forever, all &c., being part of lot number twelve, first concession of the township of Rawdon, and known as lot number two on the north side of Front Street and lot number two on the south side of Church Street, &c., and the said Elizabeth barred her dower, &c., and which said lands &c. are the same lands &c. in the said first deed and memorial mentioned and described.

That afterwards, while defendants were registrar and deputy as aforesaid, and after the said production by said Albert Lewis Smith of the memorial above mentioned and the payment of fees as aforesaid &c., and while the said memorial and deed aforesaid remained in the defendants' hands as registrar and deputy as aforesaid, for the registration of the said memorial, to wit, for 24 hours, the said

John A. Chisholm, to wit, on the 10th March 1852, did bring to the office of the said George Benjamin, as such Registrar, at Belleville aforesaid, a memorial in writing of the said second deed &c. duly attested &c. and produced the same to the defendants, as such registrar and deputy as aforesaid, for the registration thereof. That no such memorial or deed had been placed in defendants' hands as secondly mentioned before, or at the time, or until after the deed and memorial were so placed by Smith as aforesaid &c.

That afterwards, and while defendants were registrar and deputy as aforesaid, and after the deed to Smith and his memorial had been placed in defendants' hands as aforesaid &c., for registration as aforesaid, and after the said John A. Chisholm had produced to defendants as such registrar and deputy as aforesaid the said other deed and memorial for registration as aforesaid, and after the said memorials were so produced to the said defendants as such registrar and deputy as aforesaid, *in the order above mentioned*, and had been brought to the office as aforesaid and came to the hands of the defendants as aforesaid in the order aforesaid; that is to say, in the first place the memorial of the deed to Smith, and in the second place, the memorial of the deed to John A. Chisholm, the defendants did not at any time nor did either of them enter as registrar the said memorials in the said order that they respectively came to their hands, as required by the statute in that case &c., but they and each of them unlawfully and wilfully wholly neglected so to do, And afterwards, to wit, on the 23rd March in the year last aforesaid, at Belleville aforesaid, the said Emanuel Hymen Benjamin, then being such deputy as aforesaid, and as such deputy of the said George Benjamin, in the said office of registrar as aforesaid, with the knowledge and consent of the said George Benjamin as such registrar as aforesaid, did enter and register the said memorial under the hand and seal of the said John A. Chisholm, by them lastly received as aforesaid before entering or registering the said memorial under the hand and seal of the said A. L. Smith, And afterwards, and after the registration of the said memorial under the hand and seal of the said John A.

Chisholm, to wit, on the 26th of March in the year aforesaid, the said Emanuel Hymen Benjamin, then being such deputy as aforesaid, and as such deputy as aforesaid, and with the knowledge and consent of the said George Benjamin, did enter and register the said memorial under the hand and seal of the said A. L. Smith firstly above mentioned and firstly received by them as aforesaid, contrary to the form of the statute in such case made and provided.

And so that the defendants so being such registrar and deputy as aforesaid, did, to wit, on the said 23rd March, unlawfully and wilfully neglect to perform their duty, and in the said office of registrar of the said County of Hastings as required by the statute &c. to the great damage of the said A. L. Smith, against the form of the statute, &c.

The defendants being tried and convicted at the Autumn Assizes held at Belleville in the year 1853, Mr. Justice Burns reserved and referred to this Court the following points:

1st. At the trial the counsel for the Crown claimed the right to cause some of the jurors returned upon the general panel to stand aside until the panel should be gone through, under and by virtue of the 16 Vic., ch. 120., sec. 7. The counsel for defendants objected to that, and insisted that no alteration had been made by this act as to the effect of the previous jury law, under which the Crown could not cause jurors to stand aside until the panel was gone through and had only a legal right to a peremptory challenge of a limited number.

That the 16th Vic., ch. 120, sec. 1, repealed the 69th section of the Jury Act, and section 7 substituted another clause for the 69th clause, and not having repealed section 51 of the former act, the law stood as it formerly did. The learned judge allowed the trial to proceed, and on the part of the Crown a considerable number of the jurors, exceeding three, were directed to stand aside, and they were passed over and not sworn.

2ndly. After being convicted, the defendants moved in arrest of judgment, on the above ground, and also on the ground that defendants, as registrar and deputy, could not

be indicted together in one indictment and be legally convicted at one and the same time, and that the deputy registrar could not be legally convicted so long as his principal legally held the office. In consequence of these objections the learned judge reserved the case and deferred judgment, and now requests the assistance of this court, as follows :

1st, Was his view and construction of the Jury Act as amended correct in permitting the claim to be acted upon on the part of the Crown for the jurors to stand aside until the panel was gone through.

2ndly, Is the indictment correct in charging a misdemeanor against the principal registrar and the deputy registrar jointly.

3rdly Is the deputy registrar liable to conviction so long as the principal legally holds his office.

The case was argued during Hilary term, February, 1854.

Eccles, for defendants, contended, that the indictment was found when the statute 13 & 14 Vic., ch. 35 was the only act in force, and that that act, and not the 16 Vic., ch. 20, should have governed the case.

As to the joinder of defendants, that they could not be joined in the same indictment is supported by the Registry Law, and that they could only be indicted under that act.—*Rex v. Fell*, 1 Salk 271, S. C. 1 Lord Ray. 424; *Saunderson v. Baker*, 3 Wil. 316; *Woodgate v. Knatchbull*, 2 T. R. 148.

That the registrar is only charged with knowing that *Chisholm's* memorial was registered before *Smith's*, without charging him with knowing that *Smith's* memorial should have been registered first.

That the defendants are not indicted under the act; the 21st clause says that for misconduct the registrar shall forfeit his office and pay, &c., to be recovered by bill plaint or information, which is the only remedy, and gives no right to indict, and that under that section the deputy is only punishable after the registrar goes out of office.

Richards, for the Queen—1st, as to the right to challenge, That the Crown has a right to challenge in misdemeanor.—*Joy* on the admissibility of confessions, 156.

At common law the crown had the right to challenge, and then the statute 33 Edward I., ch. 4, has been held to allow the Queen to challenge the panel; and then in going over the panel a second time the crown must assign a cause certain, which is then enquired of by the Court.

That the provincial act being nearly in the same words, the Court will put the same construction on it as has been put on the English act.

2ndly, As to the joint indictment, that the registrar and his deputy have by the powers of the act the same duties and authority, and the effect of the act imposes the same.—Secs. 7, 8, 9, 10, 11, 13, 15, 23, 25, and 26 speak of the registrar and his deputy doing the acts prescribed, and the same oath of office is taken by both.

That the defendants neglected a duty under the act, and are therefore indictable.—2 Hale P. C. 332.

That one indictment lies against two parties for not enquiring of a riot.—2 Bur. 984.

That two defendants may be indicted for singing a libellous song.—Star. Crim. Ev. 37; Russell on Crimes, 141; Rex. v. Gash, 1 Star. 441; Fletcher v. Ingram, 5 Mod. 129; 2 Chitty's Crim. Law, 283, 291.

That the 21st section of the Registry Act does not release a registrar or his deputy from his common law liability for violating a public duty imposed by an act of parliament.

MACAULAY, C. J.—1st. Before our late jury acts it was well understood that the Crown might challenge peremptorily in indictments for misdemeanor as well as for felony, without shewing cause, until the panel was exhausted.

It is said that before the statute 33 Ed. I., sec. 1, St. 4, the King might challenge peremptorily without shewing cause, but that act was construed to restrain the privilege and to require the Crown to shew cause if the panel was otherwise exhausted.—Co. Lit. 156 *b.*; Joy on right of challenge, 143, 146; Kennedy on Juries, 100, 148; St. 22 H. VIII. ch. 14; 1 & 2 P & M. C. 10; 1 Vent. 309-10; 9 Howell State Trials, 127-9; 25 Howell State Trials, 25; 26 Howell State

Trials 1191, 1231, 1240-2; 1 Chitty Criminal Law, 533-4.

The st. 6 Geo. IV. ch. 50, sec. 29, enacted that in all inquests to be taken before any of the courts before mentioned wherein the King is a party, though it be alleged by them that sue for the King that the jurors or some of them be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of the jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be enquired of according to the custom of the courts, &c.

In the construction of the last act it was in Sandon's case (2 Lewin C. C. 117), held by Coleridge J., that cause must be shewn when the Crown challenged. This was in 1838.

But in Frost's case for high treason in the special commission at Monmouth, 1839-40 (9 C. & P. 136), it was ruled otherwise, and the 6 Geo. IV. ch. 50, sec. 29 being substantially and almost literally the same as the 33 Ed. I., ch. 4, it received a similar construction.

The Irish act, 6 Geo. IV., ch. 54, sec. 9, contains a proviso that nothing therein contained should affect the power of any court in Ireland to order any jurors to stand by until the panel shall be gone through, at the prayer of them who prosecute for the King, as had theretofore been accustomed.

The P. S. 13 & 14 Vic., ch. 55, sec. 59, enacted that in cases in which the Queen should be a party, those who sue for the Queen shall not be allowed a *challenge* to any juror who may be called to serve upon the jury in any such case, except for cause to be assigned, tried and disposed of according to the custom of the court.

The P. S. 16 Vic. ch. 129, sec. 7, reciting the necessity for annulling the Jury Act 13 & 14 Vic., ch. 55, enacted that the 4, 12, 27, 36 and 69th clauses be repealed; and sec. 7 enacts that the following clause be substituted for the repealed 69th section, and shall be read as a part of the said act:—"That all inquests to be taken before any of the courts in Upper Canada, wherein the Queen is a party,

howsoever it be, notwithstanding it be alleged by them that sue for the Queen that the jurors of those inquests or some of them be not indifferent for the Queen, yet such inquests shall not remain untaken for that cause ; but if they that sue for the Queen will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be enquired of according to the custom of the court, and it shall be proceeded to the taking of the same inquisition as it shall be found if the challenge be true or not, after the discretion of the court ; Provided always, that nothing herein contained shall affect or be construed to affect the power of any court in Upper Canada to order any juror to stand by until the panel shall be gone through at the prayer of them that prosecute for the Queen, as has been *heretofore accustomed*."

It is contended that the 59th section of the first act not being repealed, that clause and section 7 of the last act must be taken as both contained in the former act, and the defendants having been indicted between the passing of the two, although not tried till after the passing of the last act, are entitled to the benefit of the first act as it originally stood, under which the Crown could not challenge or request jurors to stand aside without shewing cause, as was ruled by the learned Chief Justice of Upper Canada at the Belleville Assizes.—*Hitchcock v. Way* (6 A. & E. 943), *Regina v. Blakemore* (3 C. & K. 97), *Pinhorn v. Foster* (16 Ju. 1001), *Regina v. Denton* (21 L. J. M. C. 207), *Holmes v. Sparks*, (16 Ju. 975, 11 Eng. Report, 542).

It has always been my impression that the rights of the Crown since the passing of the 13 & 14 Vic., ch. 55, sec. 59, were the same as before ; and consequently, that even before the late act jurors might be requested to stand aside until the panel was exhausted, according to the custom of the court previously.

If there was any doubt upon the subject before, it is set at rest by the 14 Vic., ch. 120, sec. 7, which in my opinion supersedes, if it does not expressly repeal, sec. 59 of the former act. It is an obvious mistake in the number of the

section referred to, and the subject matter proves which was intended. And if it depended entirely upon the effect of the last act, I do not think the defendants entitled to the observance of a course in their case different from that applicable to the other criminal cases tried at the same assizes, merely because they had been indicted before that act passed. I think it governed the mode of selecting and empannelling the jury in all cases alike.

2nd. As to the joinder of the defendants: That the act of a deputy in the absence of his principal may work a forfeiture of the office, seems to have been clearly ruled.—1 Sal. 185. (5); Lane v. Cotton (11 Mod., 17), Rex v. Lenthal (3 Mod. 146), 29 H. VI. 34; 29 H. VI. 32; 16 Vin. Ab. Officer K., 4 P. 118, M. P. 120; 13 Vin. Ab. Forfeiture, 445; 1 Roll, R. 275; Reg. v. Allan McLean and R. C. A. McLean (Belleville Assizes, March 1846, Upper Canada), Dyer 238, Palmer 80, Moore 777, 787.

Assuming that the principal is not indictable for the wrongful act of his deputy, committed in his absence and without his knowledge or consent, it is a different thing when he is present or knowing and consenting to the act, both in such a case are wrongdoers and *particeps criminis*.—Rex v. Hoggins (2 Stra. 885, S. C. 2 Ld. Ray. 1574; 1 Barnard, 358, 396), Rex v. Stevens & Agnew (5 East 244), The Attorney General v. Siddons & Baines (1 C. & J. 222, 1 Tyr. 52.)

The case of Reg. v. McLean shews that the deputy may be indicted not only while the principal holds the office, but after the deputy himself has been dismissed from his office of deputy.—1 Sal. 271; Rex v. Fell (1 Ld. Ray. 424), Saunderson v. Baker (3 Wil. 316), Woodgate v. Knatchbull (2 T. R. 148), Star. Crim. Pleadings, 56, 66; 1 Chitty Crim. Law, 267; 2 Chitty do. do. 291, 710-1; Regina v. Atkinson (2 Ld. Ray. 1248), Rex v. Loggen (1 Stra. 75), R. v. Hoggins (2 Ld. Ray. 1574), Parker v. Kett (1 Ld. Ray. 658), Rex v. Burfield (2 Burr. 981-4), Trafford v. Rex (8 Bing. 204), Rex v. Holland (5 T. R. 607), Rowning v. Goodchild (3 Wil. 443, 454, 2 W. B. 907, 910), Lane

v. Cotton (1 Ld. Ray. 646-7), Barnes v. Foley (5 Bur. 2711), Rex v. Trafford (1 B. and Adolphus 874), Trafford v. Rex, in Error (8 Bing. 204).

It is not alleged that the registrar was actually present when his deputy registered the memorials out of their order or that he directed such entries in the order observed ; but it is averred that having previous knowledge of the delivery and receipt of both memorials and of the order in which they were received, the irregular entries were afterwards made with his knowledge and consent. Undersuch circumstances, although it is not alleged that he knew the deputy was reversing the order in which the memorials ought to have been entered, nor that the principal knew the deputy was wrongfully entering the second memorial in preference to and before the first that was received, I think the scienter sufficiently averred, and that he is accessory to the wrongful and illegal act alleged as a joint breach of the duty of himself and deputy ; and that in misdemeanor accessories being principals and constructively present in law, both are liable to be indicted and convicted for what thus appears to have been a joint act of misfeasance in the execution of the office. I think, therefore, that the joint indictment and conviction may be legally sustained, if the facts (as we must on this reference assume them to have done) established the joint offence as laid.—16 Ju., 390, R. v. Greenwood (9 Eng. Rep. 535).

The objection is on the record ; and if the defendants are not concluded by the reservation and reference made to this court, our decision may be open to review by an appeal to the Court of Appeal. At present I have no doubt upon any of the points reserved and submitted to us, and am of opinion that the indictment and conviction of the defendants jointly are valid in law.

McLEAN, J., and RICHARDS, J., concurred.

HANSCOMBE V. MACDONALD.

Accord—Satisfaction.

Plea—That it was agreed between plaintiff and defendant, that defendant should deliver to plaintiff, and that plaintiff should accept and receive, in full satisfaction and discharge, &c., certain promissory notes of a third person, amounting to, &c., and that after the making of such agreement and before suit, to wit, &c., defendant then delivered to plaintiff, and plaintiff then accepted and received, the said promissory notes, in full satisfaction and discharge, &c.

Replication—That it was not agreed between plaintiff and defendant, as in the plea alleged, nor did plaintiff accept or receive the promissory notes as therein alleged.

Held, first, That the plea was sufficient, the delivery and acceptance of the negotiable promissory notes of a third person in satisfaction, though for a less sum in amount, is a good answer to the action in point of law.

Held also,—That the replication was bad for duplicity.

To a declaration containing two counts—the first, on a bank check given by the defendant to plaintiff for £200, dishonored, and the second upon an account stated for £200—the defendant pleads, that, after the accruing of the said causes of action and before suit, to wit, on the 23d of November 1833, it was agreed between plaintiff and defendant, that defendant should deliver to the plaintiff, and that the plaintiff should accept and receive of defendant, in full satisfaction and discharge of all the rights and causes of action in the declaration mentioned, certain promissory notes of a third person for certain sums together amounting to £190 15s. 10d., at a day not arrived when the suit was commenced, and a bank check of defendant's for £16 15s. payable on a day then past, and that after the making of such agreement and before suit, to wit, on the 24th day of November 1853, he the defendant, in pursuance of the said agreement, delivered to the plaintiff the said promissory notes and check—defendant then having funds at the said bank to meet the said check, and the plaintiff then accepted and received of and from defendant the said promissory notes and check, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned.—*Verification.*

Replication.—That it was not agreed by and between the plaintiff and defendant, in manner and form in the plea alleged, nor did plaintiff accept or receive of or from defendant the said promissory notes and check, or any or

either of them, in full satisfaction or discharge *modo et forma*, &c.

Demurrer, on the ground of duplicity, &c.

The plaintiff objects to the plea as bad on general demurrer, in pleading promissory notes and money for a less sum than the sums mentioned in the declaration in satisfaction thereof.

MACAULAY, C. J.—As to the objection to the plea, the cases shew that when (as here) the defendant pleads the delivery and acceptance of the negotiable promissory notes of a third person in satisfaction, though for a less sum in amount, it is good as a satisfaction, and the plea sufficient.—*Sanders v. Coward* (13 M. & W. 68), *Sibree v. Tripp* (15 M. & W. 23; 11 U. C. Q. B. R. 16.)

As a mere plea of delivery and acceptance in satisfaction, not preceded by an accord, it does not aver that the promissory notes and check were delivered in satisfaction, although it is alleged to have been in pursuance of the agreement, thus referring to the accord previously stated.

As a mere plea of satisfaction, it would resemble *Pinnell's case* (5 Co. 117), in which judgment was given for the plaintiff, for insufficient pleading—for he did not plead that he had paid the £5 2s. 2d. (therein mentioned) in full satisfaction (as by law he ought), but pleaded the payment of part generally—*i. e.*, a less sum than the amount of the debt, and that the plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it.—2 *Brown* 107-8; *Styles*, 263; *Webb v. Weatherby* (1 Bing. N. S. 502); to same effect, *Peytoe's case* (9 Co. 78, 80). The general doctrine of accord and satisfaction, and the best form of pleading—*Doc. Pla.* 19, 21; *Com. Dig. Accord*, *ib.* ch. 3. It is said, if pleaded as a mutual agreement, the defendant must shew an agreement upon which *assumpsit* is maintainable—*R. T. J.* 158; and upon which an action is, at the time given—*T. Jo.* 168;

and that the agreement was performed, &c.—Lut. 185, and how—Skin. 391; *ib.*, ch. 4. To this plea, plaintiff may reply, not received in satisfaction—or, not delivered in satisfaction—9 Co. 80; Young v. Rudd (5 Mod. 86). Paine v. Martin (Str. 573), Drake v. Mitchell (3 East. 251), Webb v. Weatherby (1 Bing. N. S. 502; S. C. 1 Sate. 474.) The plea is not to the damages sustained by reason of the defendant's breach of the promises—Griffiths v. Owen (13 M. & W. 58, 17 Ju. 67; 13 Eng. Reports 274). In Dewolf v. Bevan (13 M. & W. 160), Pollock, C. B., said, the replication to the plea of accord and satisfaction, in the old form, in the books of entries, traverses are part only of the allegation; and we cannot find any cases in which both have been denied together. In Bainbridge v. Lex et al. (9 Q. B. 819), to a plea of agreement of accord and satisfaction resembling the present case the plaintiff traversed the alleged agreement, to which defendant took issue, and the plaintiff obtained a verdict; after which defendant moved for a repleader or to arrest judgment,—Watson for plaintiff, on argument, referred to Bro. Ab. Tit. Traverse, per sans ceo. pl. 179, where Brian, C. J., was reported as saying: “In trespass, le defendant pled’ in satisfaction, cè est tantum traversable, mes sil pled’ accord ou pled’ submission, arbitrement et satisfaction, le partie poit traverse laccord’, le submission, arbitrement, ou le satisfaction, car quant le party voit alleage les circumstances et ne besoigne, la ceo est traversable quod nota”—referring to year book Trin. 4 H. VII., fol. 9 B. pl. 2, where the Chief Justice says, “joe scay bien quel est common erudition, a cet jour.”

The language of the judges in holding the plea not immaterial, but a good traverse, contains nothing against the validity of a plea traversing both the agreement and acceptance.

Lord Denman said, it was clear the agreement mentioned in the plea was made an ingredient in the satisfaction.

Patterson, J., said the two were clearly mixed up; that the acceptance alone was immaterial and likened to an award.

Coleridge, J., said the payment was nothing without that being shewn for which it was made. "We cannot separate it from the agreement."

Wightman, J.—The satisfaction is pleaded as made in pursuance of the agreement, and if the party chooses so to plead it, he makes the agreement material and traversable. *Edwards v. Greenwood* (5 Bing. N.S. 476), *Stead v. Poyer* (1 C. B. 782), *Sutton v. Page*, (3 C. B. 204), *Washbourn v. Burrowes* (1 Ex. R. 107), *Gore v. Wright* (8 A. E. 118), *Smith v. Lovett* (10 C. B. 6), *Wright v. Acres* (6 A. & E. 726), *Down v. Hatcher*, (10 A. & E. 123), *Bennison v. Thilwell* (7 M. & W. 512), P. S. 7 W. IV., ch. 3 s. 29, *Reynolds v. Blackburn* (7 A. & E. 161)—double plea—*de injuria* ; *Smith v. Dixon* (7 A. & E. 1), *Eden v. Turtle* (10 M. & W. 635)—onus of proof not enhanced ; *Bell v. Tuckett* (3 M. & G. 705), *O'Brien v. Saxon* (2 B. & C. 908), *Purchell v. Salter* (12 B. 197-209).

The language of the cases is not explicit. That used in many would support the replication as traversing only one point—*i. e.* satisfaction, although compounded of the *accord* and its *execution*—a contract executory afterwards executed. To adopt them, however, is in effect almost holding that whenever a plea is not double, all the facts may be traversed, as may be done by a replication of *de injuria*, as when it is double.—*Reynolds v. Blackburn*, (7 A. & E. 161).

The weight of authority, however, as bearing more directly upon the matters of this plea, tends to the conclusion, that the accord being pleaded executory and before its execution, and not merely a delivery and acceptance in satisfaction without any previous accord, the defendant cannot traverse both.

The cases in T. Jo. 158-168, seem to shew that the accord should be such an agreement as without performance operated as a discharge of the previous cause of action,—as if the agreement were, that the promise to deliver, &c., and not the execution of such promise, was taken in satisfaction. So that an accord might operate two ways :—

1st. By the agreement or promise itself, being accepted in satisfaction.

2nd. By performance of the promise.

When it is executory only, performance must be alleged, and defendant may deny either the agreement or its execution, when final in itself as a satisfaction,—*i. e.* where both constitute one transaction, both may be traversed together. As that plaintiff did not agree to accept the defendant's promise, and to do so, and so in satisfaction, or that the subject was not delivered or accepted in satisfaction.—*Bayley v. Homan* (3 Bing. N. S. 916, 5 Tyr. 166, 2 C. M. & R. 649, 5 ib. 1079, ib. 408), *Siboni v. Kirkman* (1 M. & W. 418, T. & G. 764), Com. Dig. accord 13-4, *Good v. Cheeseman* (2 B. & Ad. 328), *Evans v. Purvis* (11 Ju. 1043).

I cannot say I am quite satisfied with the distinction taken in the cases, or that the present replication is not good according to the principle of *Robinson v. Rayley* (1 Bur. 316), and that class of cases, or that the traverse is not properly limited to the accord, or the satisfaction separately only when the assumpsit in the agreement of accord is accepted as a satisfaction, or that the agreement without execution constitutes the satisfaction in itself, when the execution would be immaterial and unnecessary, or when the accord is of all matters in difference between the parties on both sides, including the cause of action stated in the declaration, when the agreement of accord would be more comprehensive than the ordinary instance of a delivery in satisfaction of the cause of action only.

The test however seems to be whether the traverse of both enhances the burden of proof (*Muspratt v. Gregory* 1 M. & W. 635) beyond what would be involved in the single traverse of one allegation only; and it seems that when a distinct accord, afterwards followed by performance is stated, that such would be the effect of a double traverse.

It may be said, proof of delivery in, and acceptance in satisfaction would include proof of both the accord and

satisfaction; but it rather seems, though I feel the difficulty of sustaining it, that such proof, being of only one single transaction, would merely prove a satisfaction, and that if a substantive accord is alleged it must be proved as the basis of such satisfaction and that a traverse of the delivery or acceptance in satisfaction, (both of which are concurrent acts and put in issue, by the traverse of either, and both of which may therefore be traversed together) would not put the previous accord in issue, nor would a traverse of such accord be proved by shewing a delivery and acceptance in satisfaction.

The agreement and the execution of the agreement, or the accord and the satisfaction, being pleaded as two independent acts or transactions, seem to be considered as constituting two distinct points in the defence, though both necessary to make up a complete defence.

Therefore, deferring to what I take to be the weight of authority, rather than yielding to conviction, I must hold the replication bad.

To sustain it would be running counter to the decisions that most nearly embrace the question, and which may be supported by grounds and reasons, distinguishing them from other cases that seem to me conflicting, on grounds that I have not been able to trace out or clearly to perceive.

McLEAN, J., and RICHARDS, J., concurred.

Judgment accordingly.

ROSS ET AL. V. CAMERON ET AL.

Declaration—That, to wit, on, &c., in consideration that plaintiffs would sell, deliver and advance, to D. C., goods, between the day aforesaid and the 1st April, 1852, defendants promised plaintiffs to be accountable for the payment for whatsoever goods the plaintiffs should sell, deliver and advance to said D. C., on the understanding that their liability in respect of said goods was not to exceed £500, and that it should not be enforced until after three months' notice; and that defendants agreed that the making, endorsing or renewing of any notes by defendants, in payment for goods so to be advanced, should not operate as a discharge of the said guarantee, any rule of law or equity to the contrary notwithstanding, setting forth the residue of the guarantee; and then avers, that on sundry days and times, between, &c., plaintiffs did sell, deliver and advance to said D. C. goods amounting to £500, yet, &c.

At the trial, it was objected that the guarantee was not proved as laid, the declaration being as upon a single one, and the proof of two.

On motion for a nonsuit on this ground, *Held* that the guarantee produced in evidence sustained the declaration as laid, and that there was no variance.

Writ issued 20th December 1852. Declaration, 3rd January 1853.

ASSUMPSIT upon a guarantee.

The first count states that, to wit, on the 26th October 1848, in consideration that the plaintiffs would sell, deliver and advance, to Duncan Cameron, goods in the way of his trade and business, between the day and year last aforesaid and the 1st April 1852, the defendants promised the plaintiffs to be accountable and responsible for the payment for whatsoever goods the plaintiffs should sell, deliver and advance to the said Duncan Cameron, on the understanding that their liability in respect of such goods was not to exceed £500, and that it should not be enforced until after three months' notice in writing, &c.; and that defendants further agreed, in consideration aforesaid, that the making and endorsing any notes by any of the defendants, or the taking of any note or notes, or the renewal thereof otherwise, in payment for goods so to be advanced, should not operate as a discharge of the said guarantee or in anywise affect the liability of the defendants under it, any rule of law or equity to the contrary notwithstanding, &c., setting forth the residue of the guarantee hereafter mentioned.

Plaintiffs then aver that afterwards, on sundry days and times between that day and the 1st of April 1852, they did sell, deliver and advance, goods to said Duncan Cameron,

&c., in the way of his business, &c., at reasonable prices, &c., amounting to £500; yet although the time for payment thereof had long since passed, the said Duncan Cameron had not paid for the same, though requested. That notice thereof was given to the defendants, &c., three months before action, &c.; yet defendants, though requested, have not paid, &c.

Pleas—1. Non-assumpsit and issue.

2. That the said Duncan Cameron, after the sale to him and before defendants were called upon to pay the said sum of £500, and before suit, to wit, on, &c., paid the plaintiffs, and they accepted and received from him the said sum of £500, in full satisfaction and discharge of the plaintiffs' said claim and cause of action, for and in respect of the said prices of the said goods and the said demand of the plaintiffs. Verification.

Replication.—That said Duncan Cameron did not, after the said sale to him, and before the defendants were called upon to pay the said sum of £500, and before suit, to wit, on, &c., pay to the plaintiffs, nor did they accept and receive of and from him, the said sum of £500, in full satisfaction and discharge of the plaintiffs' said claim and cause of action, for and in respect of the said prices of the said goods and the said demand of plaintiffs: concluding to the country and issue.

At the trial, the plaintiffs proved a guarantee, as follows:

“Toronto, 26th October, 1848.

“Messrs. Ross, Mitchell & Co.

“Gentlemen,—We, the subscribers to this guarantee, trustees under the will of the late Lieut. Col. Duncan Cameron, will hold ourselves responsible for the payment of any goods you may advance Mr. Duncan Cameron, between this time and the 1st day of April 1850, on the understanding that our liability under this guarantee is not to exceed the sum of £500, and that it shall not be enforced against us until we have had three months' notice in writing; such notice to be good and deemed sufficient on service upon any one of us personally, or left at our usual place of abode. We further agree, in consideration aforesaid, that the making or endorsing any notes by any of us parties to this guarantee, or the taking of any note or notes,

or the renewal thereof otherwise, in payment for goods so to be advanced by you, shall not operate as a discharge of this guarantee, nor in anywise affect our liability under it, any rule of law or equity to the contrary notwithstanding. And further, that this guarantee shall not be affected by the death or retirement of any member of your firm, or the addition of any partner or partners thereto, but shall extend to the goods supplied by the firm so altered; nor shall this guarantee prevent the said Duncan Cameron from being liable to pay for any goods so furnished to him as aforesaid.

“We remain, &c.”

(Signed by the defendants.)

On the other half of the same sheet of paper is written—

“We, the subscribers to the foregoing guarantee, agree that *the same shall continue and shall be a good and subsisting guarantee to all intents and purposes, until the first day of April, 1852, both for the balance at present due and for all goods that may be advanced by the said Ross, Mitchell & Co., till that time.*”

(Signed by defendants. Not dated.)

At the trial before Macaulay, C. J., at the last fall assizes, for the united counties of York, Ontario and Peel, the guarantee was admitted by the defendants' counsel, and an account between the plaintiffs and Duncan Cameron was produced and proved. It commenced on the 31st October 1848, and continued to the 9th June 1853, to which period, including interest, the balance claimed by the plaintiffs was £157 15s. 8d.; but the last sale of goods was on the 7th October 1852. The first item being for goods £148 15s. 9d., which was proved to have been sold at four months' credit. On the debtor side of the account are charges for goods, interest, cash, in alternate succession, from the 31st October 1848, to the end. On the credit side are notes, cash, goods, principally notes and cash; the first item being 31st October 1848, note £148 15s. 9d. The course of dealing appeared to be that the defendants' principal was in the habit of giving his promissory note in favor of the plaintiffs, from time to time, for the amount of goods purchased or balances due; which notes were credited to him when given, and afterwards recharged, or the amount thereof and interest, when not paid at maturity by the maker, but retired by the plaintiffs.

The defendants' counsel objected—1st. That the guarantee was not proved as laid; the declaration being as upon a single one, covering the whole period, from the 26th October 1848 to the 1st April 1852; whereas the proof was of two, the first limited to the 1st April 1850, and the other manifestly after expiration of that period, though without date, reviving and continuing it to the 1st April 1852. That it was likewise more comprehensive than the first, which was limited to £500; whereas the last was for the balance due, and for all goods that might be advanced by the plaintiffs till the 1st April 1852. That as to the first balance, it could not be included in the latter; and, if not, there was no balance remaining due upon goods received after 1st April 1850, if all credits since that period be applied thereto. The balance on the 1st April 1850 was only £103 6s. 1d.; but a note of £154, previously credited was afterwards recharged in the account, which would raise it to £257 6s. 1d.

2ndly. The defendants' counsel contended it was not a continuing guarantee beyond the first £500 worth of goods delivered, and did not cover the ultimate balance, not exceeding that sum.

3rdly. And that according to the established rule respecting the importation of payments, and the credits which defendants were entitled to have applied to the goods for which they were guarantees, the balance claimed of £157 15s. 8d. was already paid as between plaintiffs and defendants, however still due as between plaintiffs and Duncan Cameron. He claimed credit in defendants' favor for £35 16s. 3d. for cash charged in plaintiffs' account against their principal, as paid Building Society 31st May 1852; costs paid Dalton, 31st August 1852, £17 12s. 4d.; and interest upon notes discounted, &c. It was then agreed that a verdict should be rendered for the plaintiffs for £157 15s. 8d., with leave to the defendants to move the entry of a nonsuit on the ground of variance, or to reduce the verdict or enter it for defendants, if entitled to do so on the second issue, according to the correct result of the debtor and creditor sides of an account as between the plaintiffs and defendants.

Cameron, Q. C., obtained a rule last term upon the plaintiffs, to shew cause why a nonsuit should not be entered, or the verdict be reduced or entered for the defendants accordingly.

Macdonald, for the plaintiffs, shewed cause, and produced a statement of the account, rendered upon the principle supposed to be contended for by the defendants' counsel, and shewing a balance due the plaintiffs of £155 14s. 10d. He contended that there was no variance: that the two writings could be taken together, and constituted in effect one guarantee, which was a continuing one to the 1st April 1852, to the amount of £500, or any less sum that remains due upon the sale of goods on that day.—*Semple v. Pink*, 1 Ex. R. 74; *Mayer v. Isaac*, 6 M. & W. 605; *Martin v. Wright*, 6 Q. B. 917; *Chapman v. Sutton*, 2 C. B. 646; *Hitchcock v. Humphrey*, 5 M. & G. 559. Also, that according to the state of the accounts, and allowing the defendants the benefit of all credits to which they could be entitled, there remained then the amount of the verdict, or nearly so, for which they were liable.—*Sir Jas. McGregor v. Goula*, 4 U. C. R. Q. B. 378.

Cameron, Q. C., in reply, submitted that he was entitled to a nonsuit on the ground of variance, which was palpable upon comparing the two writings relied upon with the declaration, in which the two separate and successive guarantees were treated and described as only one. That the first limited the liability to £500; whereas the second covered the balance due upon goods sold, to an unlimited or undefined amount, as well as the balance upon part transactions. That on the 1st April 1850 the balance due was £103 4s. 1d., which sum had been discharged by subsequent payments long before the 1st April 1852, according to the application of the credits by the plaintiffs in their account rendered. Wherefore any balance on the 1st April 1852 must have been for sales since the expiration of the first guarantee. That in the second, no principal is named to whom the goods were to be advanced; and if the first must be referred to, it proved them to be two guarantees. He contended therefore, first, that there were two distinct

contracts; and secondly, that the second was misdescribed if taken alone, not being for the specific sum of £500.—*Raikes v. Todd*, 8 A. & E. 846; *Wood v. Benson*, 2 C. & J. 90; *Theobold's Principal and Surety*, 89, 98.

He further contended that the whole balance due upon goods had been already discharged by the plaintiffs' application of the credits. That the defendants were not liable to interest, nor upon promissory notes or charges for renewals, &c., and that, rejecting such items, no balance for which defendants could be liable remained.

He also contended that the acceptance of notes discharged the defendants, notwithstanding the language of the first guarantee. That the accounts shewed the notes to have been taken in payment, and therefore they could not be recharged as cash, so as to recharge the defendants, however correctly recharged as against their principal.—See 4 Eng. R. 378; *Colborn v. Dawson*, 15 Ju. 680; 10 C. B. 765, S.C.; *Rall v. Dennistoun et al.*, 21 L. J. Ex. 278.

MACAULAY, C. J.—I think the rule should be discharged. The first and principal ground of objection was variance; the declaration stating a single guarantee, as from the 26th October 1848 to the 1st of April 1852, whereas the evidence shewed two, the first from the 26th October 1848 to the 1st of April 1850, and the last from that time to the 1st of April 1852; and it was contended that the last was given after the expiration of the former. But, however that was, I think the defendants are concluded from saying the first was not continued, and that the two together are stated according to their legal effect. The defendants, by the second instrument subscribers to the foregoing guarantee, agreed that the *same* should be continued, and should be a good and sufficient guarantee to all intents and purposes, until the 1st of April 1852, both for the balance then due and for all goods that might be advanced by plaintiffs till that time.

Now by this, the *same* guarantee was *continued* a good and subsisting guarantee till April 1852. The only effect of the second was to extend or prolong the former. In point of time the original guarantee was extended, and

became in effect a guarantee from the beginning to the 1st of April 1852; and the 1st of April 1850 in the first, is to be read as if the 1st of April 1852 was substituted. That is the effect and substance of the first instrument.

At all events, the agreement is laid under a *videlicet* as to time. The whole cause of action arose out of transactions since the second instrument or guarantee; and therefore, treating the day laid as immaterial, the guarantee is proved as laid.

If my view be correct, it disposes of the objection that the second is more comprehensive as to the extent of defendants' liability than the first. I think it merely extended the duration of the first guarantee, and is limited thereby as to the amount; so that there is no variance in the statement of the sum guaranteed. When signed, or whether the second guarantee was signed before, at, or after the expiration of the first, does not appear; it bears no date; but I do not think it of material importance.

It was not objected, that as the plaintiffs alleged goods advanced to the amount of £500 only, and as more than £500 had been paid for goods sold and delivered to defendants' principal, the plea of payment was established, and that the plaintiffs should have new assigned, or replied that more goods than £500 worth were sold, and that the sum mentioned in the declaration was only the balance due on a greater quantity and amount.

As to the true balance,—taking the debtor side of the plaintiffs account to the 1st of April 1850, for goods exclusively, the amount would be £681 3s., from which, deducting the credits, excluding promissory notes credited and afterwards recharged, the amount would be £398 12s. 6d.; leaving £282 10s. 6d. due the plaintiffs at that date.

Then stating the account in the same way, from the 1st of April 1850 to the time this action was brought, the debtor side would be £1429 15s. 8d. and the credits £732 1s., leaving £697 14s. 8d. due the plaintiffs; and then, adding the two balances together, the amount would be £986 11s. 2d.; from which deducting subsequent credits £644 1s. 5d., would leave £336 10s. 7d. due. This mode

of stating the account excludes interest on both sides and rejects notes not paid at maturity, but retired by the plaintiffs. It is the most favourable way of stating it for the defendants; and in any way of making of the account the balance, according to the doctrine of the importation of payments, would be in the plaintiffs' favour for a sum equal to the verdict—that is, at the time of action brought; and subsequent payments cannot be brought in except by consent, not being pleaded. I do not see that the balance claimed at the trial could be reduced, unless there be overcharges of interest, which I do not understand to be contended as between the plaintiffs and defendants' principal; and if, as we have been given to understand, all the debt is paid, leaving only in question in this suit now the right to costs, I think the plaintiffs entitled thereto.

As to the notes, I think the guarantee expressly provides for their being taken without prejudice; and I do not consider that they constituted payments, not being taken in satisfaction, but only on account, to be payment if duly retired at maturity, if not, to be recharged in the account; in effect to be struck out and cease standing to the credit of the defendants' principal.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

URSULA McWHIRTER V. THOMAS A. CORBETT, SHERIFF &C.,
AND WILLIAM LOW.

Commissioner—Sheriff.

A commission having been granted to a person to administer affidavits in the Midland District, which then included the present county of Prince Edward and the united counties of Frontenac, Lennox and Addington, the county of Prince Edward being afterwards set aside as a separate district, and the commissioner at the time of such separation being resident in the united counties of Frontenac, Lennox and Addington:

Held, That his authority to administer affidavits in such united counties would continue.

A sheriff is not entitled to notice of an action against him arising out of a private suit.

TROVER for divers enumerated goods.

Pleas: 1st, Not guilty; 2nd, Not possessed and issues.

At the trial, before Burns, J., at the last fall assizes, held

in and for the united counties of Frontenac, Lennox and Addington, it appeared in evidence that by a mortgage dated 27th March 1852, David McWhirter assigned all the goods in question except three cows to the plaintiff, to secure a debt of £350 alleged to be due by him to her. This instrument is not with the exhibits returned to the court, but it is spoken of as having been absolute at the end of three days—that is, on the 1st of April 1852; that it was filed on the 30th March 1852 and refiled on the 28th March 1853, and a statement of what was due was filed the same day. A pair of horses were delivered to the plaintiff at the time of execution.

It seems that the possession was not changed.

To prove the due taking of the necessary affidavits Joseph Allen was called, and said he was a commissioner for taking affidavits and had administered the oaths to the affidavits produced, apparently sworn to by plaintiff at Adolphustown. He said he received his commission to administer affidavits in the then Midland District, in the year 1828, which then included the late district and present county of Prince Edward, Adolphustown being a township therein, and after the separation of the county of Prince Edward into a separate district, in the Midland District, and now in the county of Addington, one of the united counties of Frontenac, Lennox and Addington. He said he was living at Picton when it was set off as a separate district; that on the 16th March 1831, he lived in Adolphustown, continued there three years and then went to Marysburg, district of Prince Edward, remained there three years and upwards and then returned to Adolphustown, and had remained there since, making his home at his father's house, and that he (his father) died in 1846. That he used to go to Marysburg to visit and live at times with his uncle. That he was assessed for several years in Picton up to 1830, not afterwards, and had carried on business there as an auctioneer previous to that year; that he was there when the first court was held there, but not living there. That he was in 1832 for a time living in Picton; in 1834 in Marysburg, where he carried on milling business in 1835-6

and part of 1837; that he lived in Kingston in the winter of 1833-4 for six months, and was assessed for a house he owned in Hallowell in 1832. Then he said, when the Prince Edward District was set off he was living at his father's in Adolphustown, but could not remember the date; that from 1832 to 1836 he was not a settled resident of Adolphustown, was never married and had no fixed residence in that way, but considered his father's his home.

It appeared that two judgments had been recovered by J. S. Smith against David McWhirter, and a writ of *fi. fa.* issued out of the Court of Queen's Bench, tested the 26th of July 1833, at the suit of John S. Smith, against the goods of David Ruttan and David McWhirter, to the sheriff of the united counties of Frontenac, Lennox and Addington, to levy £204 17s. 10d. in assumpsit, endorsed to make £130 4s. 9d., and received by the sheriff on the 28th July 1833. Also another *fi. fa.*, out of the same court, to the same sheriff, against the goods of McWhirter and one McFarland, for a large sum of money, received the 28th July 1833.

That under these executions the goods in question had been seized and sold, for which this action was brought. The goods sold for £180, and were valued at the trial at £326.

The defendants attempted to impeach the *bona fides* of the mortgage to plaintiff; and the debtor or mortgagor, David McWhirter, having been called as a witness for plaintiff, a number of witnesses were called by the defendants to impugn his credibility on oath, and an equal number were called in reply, to support his veracity and integrity.

The defendants' counsel objected,

1st, That the bill of sale became absolute in three days, and when refiled was absolute in law, and not a mortgage.

2nd, That there was an erasure in the jurat of the affidavit of claim.

3rd, That there is a mistake in the copy refiled, which was not therefore a true copy of the original affidavit.

4th, That the affidavit made before Allen was invalid and void.

5th, That the affidavit on refiling should have been as of an absolute bill of sale, not a mortgage.

6th, That the statement of the debt being still due was not filed, but only annexed to the other.

7th, That the statement is at variance with the affidavit in amount, interest being added.

8th, That in one affidavit the name is spelt Hover instead of Hoover.

9th, That the plaintiff was entitled to notice of action.

The learned judge who tried the cause overruled all but the fourth objection, as to which he reserved leave to move, and left it to the jury to say whether there was a *bona fide* debt due by David McWhirter to plaintiff to support the bill of sale, and if so, told the jury to find for the plaintiff the value of the property; remarking that much, though not all, depended upon the credit given to David McWhirter's statements: also, that the three cows and some hogs were plaintiff's, and so far she was entitled to a verdict at all events.

The jury found for the plaintiff, with £130 damages.

In Michaelmas term last, *Henderson*, for defendants, obtained a rule on the plaintiff to shew cause why such verdict should not be set aside and a nonsuit entered on the leave reserved, or a new trial be granted, the verdict being contrary to law and evidence, for misdirection and for excessive damages.

Walbridge shewed cause, and contended that the affidavit sworn before Allen was sufficient; that he was a commissioner of the Midland District before the district of Prince Edward was set off, and there is not evidence to shew whether he resided in the Prince Edward District or the Midland District at the time of the making of the proclamation under which the Prince Edward District was set apart under the statute 1 Wm. IV., ch. 6, and that the plaintiff should not be nonsuited on the ground that Allen was not a commissioner of the Midland District.

That the affidavit of debt need not be refiled with the copy of the mortgage—*Beatty v. Fowler*, 10 U. C. Q. B. R. 382.

That the defendants are not entitled to notice before

action brought; the preamble of the statute 14 & 15 Vic., ch. 54, limits the operation of that act to persons who were already protected by statute.

Henderson, in reply, contended that plaintiff should have been nonsuited because Allen the commissioner resided in the Prince Edward District at the time of the separation of that district from the Midland District.

That on refileing the mortgage the statement should have been refiled, and that in this case it was only annexed.—*Campbell v. Madden*, Michaelmas Term, 11 Geo. IV.

That the statement is part of the instrument and should be refiled, and a new affidavit of the debt.—Stat. 13 & 14 Vic., ch. 62.

That defendant was a public officer under the meaning of the act, and entitled to notice.—*White v. Clark*, 11 U. C. Q. B. R. 147; *Mason v. Newland*, 9 C. & P. 574; Carth 479.

MACAULAY, C. J.—The separation of the county of Prince Edward from the Midland District was provided for by the statute 1 Wm. IV., ch. 6, which was passed the 16th March 1831; and I certainly think that commissioners for taking affidavits and bail in the Queen's Bench, granted under the 2 Geo. IV., ch. 1, secs. 39-40, are within the provisions of the 5th sec. of the 1 Wm. IV., ch. 6; so that if Mr. Allen was residing in the county of Prince Edward when set apart as a separate district his authority to administer affidavits in the Midland District would cease. But, according to his evidence, he was not so resident when the act was passed. When it was proclaimed a separate district under sec. 1 was not proved by production of the Gazette or otherwise; but if it occurred within three years from the 16th March 1831, Allen represents himself as being resident during all that time in the Midland District; and if so resident when the division took place, his authority as a commissioner would continue in the Midland District, and would not cease by reason of his occasional absence or residence elsewhere afterwards, but would continue in the present united counties of Frontenac, Lennox and Addington, and the affidavit administered by him in Adolphustown would be

good. The facts therefore seem to put an end to this objection. If doubtful on the evidence, it ought to have been left to the jury, and the learned judge should have been asked so to leave it.

The statute 4 Wm. IV., ch. 19, would seem to shew that Sophiasburg was part of the Midland District on the 6th March 1834, and the 5 Wm. IV. ch. 25, passed 16th April 1835, shews that the county of Prince Edward had been set apart before that time.

2nd. As to the defendant's right of notice of action under the provincial statute 14 & 15 Vic., ch. 54, I do not think a sheriff in the execution of a *fi. fa.* against the goods of a debtor in a private suit, or his bailiff, entitled to notice of action as a public officer.

He certainly is fulfilling a duty imposed upon him by the court under the common law, but it is in a private matter; and if intended to be included in the statute, it wants explanation.

I do not consider a sheriff indictable for a criminal breach of duty in every instance in which a civil action would be maintainable against him at the suit of a private suitor for nonfeasance or misfeasance in the execution of his duty under civil process in private suits, as for not levying goods under a *fi. fa.*, or not selling, or falsely returning no goods, trespass in seizing goods or trover for converting them, &c.

I doubt not that when in the discharge of some of his public duties, strictly so called, he renders himself amenable to a civil action, he is entitled to a notice under this act, but not in cases of the present kind.

3rd. As to the mortgage—the 12 Vic., ch. 74, sec. 1, requires filing of mortgages of chattles on affidavit of execution by a subscribing witness. Sec. 3: To expire in one year, unless within thirty days next preceding such expiration of one year a true copy thereof, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by virtue thereof, should be again filed, &c.

The 13 & 14 Vic., ch. 62, further requires an affidavit of the mortgagee that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned therein, &c.,

but it does not in terms require the continuance of the debt to be verified on oath on refiling a copy and statement within thirty days of the expiration of a year, &c.

I think the *statement* being annexed to the copy of the mortgage, both were filed together in effect, though not separately marked.

Long-continued possession by mortgagor would, I think, afford evidence as a material circumstance for the jury to consider in determining the question of fraud in the original assignment; but it does not seem to have been dwelt upon as material in itself in this case; and, considering the implied power to continue a mortgage security without actual change of possession for more than one year by the provisions of the statute, I do not suppose the mere lapse of time tended conclusively to strengthen the defendants' case.

Then, as to the original transaction: If there was a *bona fide* debt due, there seemed no room to doubt the fact of the mortgage having been really executed and really made with a view to secure such debt. If supported by a good subsisting debt really existing, there seemed no sufficient ground to question the validity of the mortgage as wanting substratum to support it, and if supported by the consideration alleged, none to impeach it as not being a real transaction but colorable only, and speaking on the face of it what was not intended, contemplated or mutually understood and agreed by the parties, I think the rule should be discharged.

McLEAN, J., and RICHARDS, J., concurred.

JAMES HALL V. JAMES FRANCIS.

A declaration upon a promissory note, payable to defendant or order, averred that defendant then held the said note *until* and at and *after* it became payable, by reason whereof notice of non-payment thereof to defendant became unnecessary and was dispensed with, and *thereafter* the defendant *endorsed* the said note to the plaintiff, and the said maker did not pay, &c., although the same was *duly presented*, of all which defendant had due notice.

Second plea, That said note was not duly presented to the maker for payment thereof when the same became due as aforesaid, according to the tenor and effect thereof, *modo et forma* alleged.

Fifth plea, That after the making of the said note and while defendant was the holder, and after it became due, and before the endorsement thereof afterwards mentioned, to wit, on &c., it was agreed between W. H. and defendant, in consideration of said W. H. conveying to defendant certain land, the defendant should endorse, hand over, and transfer to said W. H. the said note in declaration mentioned, without defendant becoming answerable or liable for the payment of said note by endorsing said note for the purpose of transferring the same to said W. H. and giving him the right of action against the maker, and that said W. H. should have no recourse against defendant in respect of such endorsement, and thereupon defendant, in pursuance of and in consideration of the said agreement, and for and on no other account whatsoever, did then endorse the said note in blank to the said W. H. to enable him to recover and enforce the same against the maker, and said W. H. then took and received the same upon the terms and for the considerations and purposes aforesaid, and said W. H. being then the holder of the said note for the purposes and on the terms aforesaid, afterwards and long after said note was due and payable, and before suit, delivered said note so endorsed in blank by the defendant for the purposes aforesaid to plaintiff, who then took and received the same after the same had become due, and plaintiff now holds and has always held the same upon said terms and upon no other terms whatsoever, and there never was any consideration for the said endorsement of the said note by defendant, except as aforesaid, without this, that defendant did endorse the said note to the plaintiff *modo et forma* alleged.

Held, That the declaration was good; the passage excusing the giving notice may be rejected as surplusage; and that the averment of the notes being *duly presented* was sufficient on general demurrer.

Held, That the second plea was bad, as ambiguous and uncertain, and as importing into the traverse matter not alleged in, or necessarily implied from the declaration.

Held, That the fifth plea was bad on the ground that a collateral verbal condition or agreement varying the terms, or inconsistent with the legal import of the instrument or of the endorsement thereof, cannot be pleaded in bar.

Writ issued 6th September 1853. Declaration, 15th September 1853, states a promissory note made by William H. Boulton on the 20th December 1847, whereby he promised to pay the defendant or order £128 5s. 1d. with interest, ninety days after date, which period had elapsed before suit, and that the defendant then held the said note until and at and after it became payable, by reason whereof notice of non-payment thereof to defendant became unnecessary and was dispensed with; and thereafter the defendant endorsed the said note to the plaintiff, and the said William H. Boulton

did not pay the amount thereof, although the same was duly presented, of all which the defendant had due notice; whereby he (defendant) became liable to pay the amount of the said note to the plaintiff according to the tenor and effect thereof, and in consideration of the premises promised to pay the said sum of money and interest to the plaintiff, yet, &c.

2nd plea,—That the said note was not duly presented to the said William H. Boulton for the payment thereof, when the same became due as aforesaid, and according to the tenor and effect thereof, in manner and form as the plaintiff hath in his said declaration in that behalf alleged,—concluding to the country.

5th plea,—That after the making of the said note and while defendant was the holder thereof, and after it became due and payable, and before the endorsement thereof by the defendant afterwards mentioned, to-wit, on the 11th August 1850, it was agreed by and between William Hall and defendant that (in consideration of the said William Hall conveying or causing to be conveyed to defendant 100 acres of land in the township of Essa, and paying to the defendant £50) the defendant should endorse, hand over and transfer to the said William Hall the said note in the declaration mentioned, with other notes, &c., without the defendant in any way becoming answerable or liable for the payment of the said note or any part thereof, by endorsing the said note for the purpose of transferring the same to the said William Hall and of giving to him the right of action thereon against the said William H. Boulton, and that the said William Hall should have no recourse on or against the defendant by or in respect of said endorsement; and thereupon defendant, in pursuance of and in consideration of the said agreement, and for and on no other account or consideration whatever, did then endorse the said note in blank and deliver the same so endorsed in blank, with the said other notes, to the said William Hall, to enable him to recover and enforce the same against the said William H. Boulton; and the said William Hall then took and received the same from the defendant upon the terms and for the

consideration and purposes aforesaid, and the said William Hall being then the holder of the said note for the purposes and on the terms aforesaid, and no other, afterwards and long after the said note was due and payable, and before the commencement of this suit, delivered the said note so endorsed in blank by the defendant, for the purposes aforesaid, to the plaintiff, who then took and received the same from the said William Hall after the same had become due and the plaintiff now holds and has always held the same upon the said terms, and upon no other terms or consideration whatsoever; and there never was any consideration whatsoever for the said endorsement of the said note by the defendant, except as aforesaid; without this that the defendant did endorse the said note to the plaintiff in manner and form as the plaintiff hath above in that behalf alleged, —concluding to the country.

Demurrer to second and fifth pleas.—Special causes to second plea—1st, that it is irrelevant to the declaration, and does not deny or confess and avoid the declaration; and, 2nd, that it presents no issue arising on the declaration. Special causes to fifth plea—1st, that it does not allege the agreement therein mentioned to have been in writing; 2nd, that it alleges a prior or contemporaneous contract differing from and inconsistent with the contract contained in and imported by the indorsement of the note therein mentioned, and seeks thereby to controul, vary, alter, and contradict the written contract by the said indorsement of the said note contained, signified, and imported, and yet doth not shew or allege such contract to have been in writing; 3rd, that defendant by said fifth plea seeks to qualify and contradict the written contract alleged in the declaration by prior or contemporaneous matter not written or alleged to be in writing; 4th, that it sets up a prior parol agreement inconsistent with what the indorsement in the declaration mentioned imports.

The defendant joined in demurrer, and gave notice of exceptions to the declaration on general demurrer—1st, that the averments therein were inconsistent and uncertain, first excusing the giving notice of non-payment, and yet

alleging due presentment and due notice to defendant; 2nd, that it shews no cause of action against the defendant, defendant not having rendered himself liable by the indorsement stated; 3rd, that the note should at all events have been presented to the maker in a reasonable time, and due notice thereof given to the defendant, and it should have been so averred.

The demurrer was argued during Michaelmas term last.

Hagarty, Q. C., for defendant, contended that the declaration could not be supported; that it avers that notice and presentment were unnecessary and not made, and then says it was *duly* presented, making the declaration insensible; that the note having been endorsed after it became due, it should be considered a new drawing, and on non-payment by the maker the endorser should have notice within a reasonable time, and the declaration should be so drawn that the facts should appear—*Marston v. Allen*, 8 M. & W. 494; *Story on Bills*, sec. 220; *Chitty on Bills*, 216; *Dehers v. Harriot*, 1 Show, 164; *Chitty junior's Precedents*, 89;—that the plaintiff was bound to state clearly when the note was presented, so that it can be determined whether it was duly presented. As to the fifth plea—that the special traverse was necessary and proper—*Steele v. Harmer et al*, 14 M. & W. 831; *Kearns v. Durell*, 6 C. B. 596;—that a contemporaneous agreement with a promissory note need not be in writing—*Lloyd v. Howard*, 1 Eng. R. 227; *Smith v. Bray*, 15 Ju. 207.

McDonald, for plaintiff, contended that the declaration was good, referring to *Brown v. Davis*, 3 T. R. 83; 3 Kent's Com. 114; *Sheperd v. Sheperd*, 1 C. B. 848; *Davis v. Dunn*, 6 U. C. Q. B. R. 327.

MACAULAY, C. J.—First, I think the declaration good. The passage from the words “by reason whereof” to the words “dispensed with” may be rejected as surplusage, and irrelevant or immaterial on the facts previously stated. It then appears the case of a promissory note, payable to order and endorsed by the payee after it had become due and while in his hands, and resembles the case of *Davis v. Dunn* (6 U. C. Q. B. R. 327). The case of *Dehers v. Har-*

riot (1 Show, 164) is much in point. See, also, *Mutford v. Walcott* (1 Lord Ray. 574, S. C. Sal. 129, 12 Md. 410).

Then as to the objection that presentment by the plaintiff, or William Hall, to the maker within a reasonable time after the endorsement by the defendant to William Hall ought to have been averred, and that it is not sufficiently shewn by the term *duly presented*, &c., I think it sufficient on general demurrer, following as the averment does the expression used in the new rules in cases where presentment is made at the maturity of the bill.—*Atkinson v. Settree* (Willis, 484, note 2 to note *a*), *Everard v. Patterson* (6 Taunt. 645), *Patience v. Townley* (2 Smith, 223), *Rex v. McArthur* (Peak, N. P. C. 155), *Williams v. Germain* (7 B. & C. 468), *Brazier v. Jones* (8 B. & C. 124), *Nightingale v. Wilcoxson* (10 B. & C. 207), *Butcher v. Stuart* (11 M. & W. 875), *Doe dem. Lloyd v. Ingleby* (15 M. & W. 472), *Mellish v. Rawdon* (9 Bing. 416), *Moule v. Brown* (4 Bing. N. S. 268), *Alexander v. Burchfield* (7 M. & G. 1067), *Brooks v. Mitchell* (9 M. & W. 15), *Chitty junior's Forms*, 256, 285; *Byles on Bills*, 14, 15, 152-3.

Some of the foregoing cases are against the sufficiency of the averment, on the ground that the use of the word *duly* does not add to the force of the allegation, as of presentment or notice of non-payment, &c.; but it appears to me that the new rules in cases of this kind were intended to impart to the word, when used in declarations upon promissory notes or bills of exchange, a force it did not previously possess; and when a *reasonable* time is the object of the averment, the word *duly* may, I think, well imply the same thing. The reasonableness of such an averment is rather matter of defence upon the evidence.

Second, I consider the second plea bad. It is ambiguous, and it is uncertain whether it means to deny a presentment when the note became due and payable or after it had been endorsed to the plaintiff. It imports into the traverse matter not alleged in nor necessarily implied from the declaration; and although the objections to it are not expressed in these words in the causes of special demurrer assigned, I think the terms used equivalent, and I cannot but regard the plea as insufficient.

Third, as to the fifth plea,—if the agreement stated should be in writing, to render it valid, it should have been so alleged. The distinction on this head is between declarations and pleas, and more certainty is required in the latter.—Case v. Barber (Sir T. Ray. 450), Duppa v. Mayo (1 Saund. 276), Wotton v. Hele (2 Saund. 180), Dean of Windsor v. Gover (ib. 297), Rose v. Main (1 Bing. N. S. 357), Kearns v. Durell (6 C. B. 596).—In the absence of such averment the cases, I think, shew that a collateral verbal condition or agreement varying the terms, or inconsistent with the legal import of the instrument or of the indorsement thereof, cannot be pleaded in bar of the action; indeed it is by no means clear that even an agreement in writing, when collateral to and not incorporated with the bill or note, in which event it would not be a negotiable instrument of that kind in law, can be pleaded as a defence to the note or bill itself when an independent instrument.—Adams v. Wooley (1 M. & W. 374), Thompson v. Chubley (ib. 212), Capner v. Mincher (13 M. & W. 704), Hartley v. Davey (1 U. C. Q. B. R. 218), Harvey v. Gray (ib. 483), Kearns v. Durell (6 C. B. 596), Besant v. Cross (10 C. B. 895), Woodbridge v. Spooner (3 B. & A. 233, S. C. 1 Chitty Rep. 661), Brown v. Langley (4 M. & G. 471), Bell v. Viscount Ingestre (12 Q. B. 318), Lloyd v. Howard (15 Q. B. 995), Palmer v. Richards (15 Ju. 41, 1 Eng. Rep. 529), Hayes v. Caulfield (5 Q. B. 81), Marston v. Allen (8 M. & W. 494), Ranson v. Walker (1 Star, 361, 1 Gow, 74).—The plea, however, concludes with a special traverse of the indorsement, alleged *modo et forma*, and the demurrer applies to the inducement to this special traverse.

The questions then are—1st. Whether, admitting the traverse to be good in itself, the inducement is open to demurrer if insufficient according to the rules of pleading; and if so, whether it vitiates the whole plea, including the traverse. 2nd. Whether the agreement relied upon as a defence can be pleaded in bar; and if so, whether it is sufficient, though it be verbal only and not in writing.

First. The case of Gough v. Bryan (2 M. & W. 773) is applicable to the question, whether the inducement be

superfluous, unnecessary, or prolix—Com. Dig. Pl. G. 20, 22.—Stephens, Pleading, 217, says that if faulty it may be demurred to as if not containing a sufficient answer in substance, so as to raise the law for the consideration of the court and properly qualify the effect of the special traverse.—Gough v. Bryan, ante; Steele v. Harmer et al (14 M. & W. 831).—Then if the inducement does not display a sufficient defence in point of substance, for reasons assigned as grounds of demurrer, the plea is bad in part, and being bad in part is bad in toto.

The case of Pearson v. Rogers (9 A. & E. 303) is not to be overlooked. It would apply if the special inducement contained a good defence in itself. I may here remark that although the case is not rested upon any such ground, it is consistent with the plea that the plaintiff gave full value for the note without notice, and before it was overdue or dishonored, as between the defendant and William Hall, although overdue on the face of it. The endorsement after being overdue created a new state of things in relation to the immediate parties and subsequent holders, although I do not suppose that, as respected any defence open to any of them as against his immediate endorser, the note could be regarded otherwise than as overdue in fact and in legal effect.

The allegation in the plea that William Hall delivered the note so indorsed in blank to the plaintiff, who took and received the same from him after it became due, and held and holds the same upon the said terms, and upon no other terms or conditions, points to the want of a valuable consideration as between the two Halls, but it does so obscurely and ambiguously, and does not distinctly aver if that was intended that the plaintiff had notice or knowledge, or received the delivery, as endorsee of William Hall, without consideration. The declaration avers an indorsement from the payee to the plaintiff without mentioning William Hall, and we must suppose therefore that if produced in evidence it would so appear, and not a blank indorsement, as the plea alleges it to have been in the first instance, and when it was delivered to and received by the plaintiff. The

lawful holder of a promissory note indorsed in blank is looked upon as bearer, and as such has implied authority to fill up the blank in his own favour, and so to make himself the endorsee in full.—Byles on Bills, 109; Walker v. Macdonald (2 Ex. R. 527).—It is such an indorsement the plea traverses under the *absque hoc* after an inducement that is defective, if the agreement therein stated should have been alleged to have been in writing or cannot be pleaded as a bar.

The difficulty on this point arises principally from the case of Pike v. Street (1 M. & M. 226, S. C. 1 D. Lloyd), in which Lord Tenterden held at Nisi Prius that if there be a verbal agreement between the first endorser and his immediate endorsee, that the endorsee shall not sue the endorser, but the acceptor,—only such an agreement would be a good defence on the part of the original endorser against his immediate endorsee suing in breach of the agreement; and similar dicta are contained in Byles on Bills, 110; Roscoe on Bills, 138; 2 Arch. N. P. 97. On the authority of this case in Chitty on Bills, 139, 7th edition, it is added that of course the defence would not prevail against a subsequent endorsee for value, taking the instrument before due and without notice. I do not find that case overruled, reviewed, or confirmed on any future occasion, nor indeed cited, except in Foster v. Jolly (5 Tyr, 240, and 1 C. M. & R. 703), in which it was explained as falling within that class of cases in which the defendant may shew a want or total failure of consideration; or, as Parke, Baron, expressed it, of a consideration moving from the plaintiff to the defendant; he said, “The agreement proved was that the defendant, although the endorser, should not be sued, but the acceptor only; that negatived any consideration, having moved from the plaintiff to the defendant, and was therefore admissible.” In the note to Byles on Bills, at p. 110, reference is made to Clark v. Pigott (1 Sal. 126, S. C. 12, Mod. 192); Gimpy v. Hardon (7 Taunt. 159), Soares v. Glyn (8 C. B. 24); but they do not appear to me to sustain the proposition. In the American note to Thompson v. Chubley (1 M. & W. 212), cases are referred to in

which it is said to have been decided in the same way in some of the United States Courts. What is said by Alderson, Baron, in the case of *Capner v. Mincher* (13 M. & W. 704), and by Maule, J., in *Kearns v. Durell* (6 C. B. 607), may tend to support it. These cases, however, seem to me to turn upon the effect of the special matter in displacing or shewing the want of consideration; and it is held in *Berant v. Cross* (10 C. B. 895), and note to the American edition, that evidence is not admissible in proof of a collateral verbal agreement or condition to control the legal import and affect the instrument on the face of it; see also *Bell v. Viscount Ingestre* (12 Q. B. 318, 15 Q. B. 995), *Hayes v. Caulfield* (5 Q. B. 81), *Marston v. Allen* (8 M. & W. 494), or to show that the defendant did not indorse in manner and form alleged.

In reference to what was said of *Pike v. Street* in *Jolly v. Foster*, I must say that it appears to me that in the former case the consideration did move directly from the plaintiff to the defendant, as in the present case it did move directly from William Hall to the defendant, and who for such consideration, and no other, did endorse the note in blank to him (William Hall), who afterwards transferred it to the plaintiff. The question does not seem to me to turn upon the consideration, as it did in several of the cases above mentioned; it turns upon the consideration whether the endorser, endorsing absolutely and in blank and delivering the note so endorsed, can concurrently therewith qualify the legal import and effect of such endorsement by proving a verbal condition or undertaking that it was so endorsed and delivered, *without recourse*. It may be said it effects the consideration in respect of which the transfer was made, because if the endorsement was made *without recourse* the consideration in that event was only given and received for the property in the note with recourse restricted to the maker, and that therefore there was no consideration for recourse being also given against the endorser by his immediate endorsee; or in other words, that the implied conditional promise in law of the endorser (unlike the express or direct promise of the maker or acceptor) may be

repelled by verbal evidence in the same way that the *prima facie* implied or presumed consideration for the making or transfer of a negotiable instrument of this kind may be so repelled ; but the very difficulty is to establish the right to prove such exception or restriction in the endorsement made by mere verbal exception or condition contrary to the legal import of the act done—namely, the endorsement in blank and the delivery of the instrument in that state to the indorsee. It seems to me a forced construction to say that the transaction negatived any consideration moving from one to the other, and tantamount to saying that absolute endorsements may be proved by verbal evidence to have been *without recourse*, as between the original or immediate parties, as those taking and holding under them with notice, or after due, contrary to the undoubted rule on that head. At least I take it to be a well settled general rule that parol, meaning verbal, conditions collateral to the legal import of bills and notes on the face of them, whether as respects acceptors, drawers, makers or endorsers, cannot be concurrently made to abridge or qualify the same, as being inconsistent with and altering or varying the written contract between the parties. Nor can such condition be pleaded in bar of actions thereon. And, notwithstanding the case of *Pike v. Street*, I still entertain the opinion that the rule applies to endorsers, before or after maturity equally with makers or acceptors.—*Hart v. Davy* (1 U. C. Q. B. R. 248), *Harvey v. Geary* (1 U. C. Q. B. R. 483), *Harris v. Goodwyn* (2 M. & G. 405), *Brown v. Langley* (4 M. & G. 466).

According to the fifth plea, the defendant, for the consideration mentioned, must have agreed to endorse the note in blank and to deliver it so endorsed to William Hall, with a collateral understanding that he was not to incur liability as such endorser, but was to be regarded merely as selling an over-due note *without recourse*. Still the very nature of the endorsement in blank imports the right of transfer in the indorsee with recourse, or else why was the endorsement not restricted on the face of it? The oral proof of exemption from liability is not like disproving the con-

sideration. The consideration, when it exists, forms the inducement to the act of making or endorsing a bill or note, and is in itself an independent fact, existing apart from the instrument; but the promise to pay in respect of such consideration is contained or appears in, or is inferred from, the instrument itself and not elsewhere, and it does not exist separately.—Byles on Bills, 61, *Abbott v. Hendricks* (1 M. & G. 791), *Ridout v. Bristow* (1 Tyr. 84), *Harris v. Goodwin* (2 M. & G. 413), *Salmon v. Webb* (3 House of Lords' Cases, 510, S. C. 7 D. & L. 324; 13 Q. B. 866; 16 Eng. R. 37).

The promise relied upon by the plaintiff in this action is not a direct or express one, like that of the maker to pay the defendant or order, but an implied and conditional one to pay as endorser, if upon due presentment the maker failed to pay and due notice of such default was given, &c.—Byles on Bills 2, *Kearns v. Durell* (6 C. B. 607).

It is a settled rule that in pleading there is no difference in law between promises expressed and implied—*Eastwood v. Kenyon* (11 A. & E. 438), *Roscola v. Thomas* (3 Q. B. 234); and I do not see that the conditional promise of the payee and indorser implied from the act of transfer by a written endorsement, though in blank, is not in legal effect equivalent to the absolute and express promise of the maker of a negotiable promissory note.—*Watkins v. Wake* (7 M. & W. 490).

The one is expressed in writing fully—the other is inferred in law from what is written; and had the conditional undertaking and liability of the endorser been written in full as constituting the terms of the endorsement, it would only have expressed what is implied from an ordinary or blank endorsement, and must have stood upon the same footing as the explicit obligation of the maker; for both would then be express promises in writing, although one was absolute to pay at all events, and the other only conditional to pay in the event of the default of the maker, &c.

There are many instances of implied covenants, and I do not suppose that such covenants could be repelled or disproved by verbal proofs any more than such as are expressed upon the face of the same instrument. I may further

observe, that the principle of the case of *Hopkins v. Logan* (5 M. & W. 241) may be applicable. It is there laid down that when the law implies a promise from the facts or acts done (as upon an executed consideration), no qualified, enlarged, or express promise can be substituted afterwards or concurrently. Here, upon the endorsement of the note in blank for value, the law implies the promise to pay contingently upon default of the maker; if so then, and that is implied from what the instrument and endorsement import, it is not readily perceived how such implication can be consistently repelled by proof of a concurrent verbal condition qualifying such implied promise, or indeed, as in the case before us, disproving it altogether, and rebutting it entirely by shewing that there was to be no recourse—that is, in other words, that no such promise was made.

Upon the whole I cannot satisfactorily adopt any other conclusion than that no such agreement as that pleaded can be sustained unless in writing, and that if made in writing, it ought to have been so stated in the plea.

I have already observed that when a concurrent agreement was not collateral, but incorporated in the instrument, it would constitute a special agreement and not a negotiable promissory note; and on the same principle, if incorporated with the endorsement, it would not be such an endorsement as the declaration alleges, and so the plea might be an argumentative denial of the endorsement alleged. But it is unimportant in my view to the cause, for I consider the agreement as stated in the plea collateral to and not embodied in the endorsement.

It has been remarked that some cases deny the admissibility of collateral agreements to control such instruments, when not incorporated therein; but in *Finlayson's* notes to his leading cases on pleading, he appears to contend that merely shewing the note to be overdue in pleading is not sufficient to sustain a defence previously existing, as between the defendants and the party who transferred it after being due, without the further allegation of notice or of something imputing fraud or collusion, and that the note being taken after it was due constituted only evidence from

which notice &c., ought to be inferred by the jury. I cannot however, say I think the cases sustain him, for they seem express that the bill or note transferred after it is due passes only, subject to whatever defence as against the bill or note itself, the prior party or parties might at the time of transfer have set up against the party who made such transfer; as to which see *Brown v. Davis* (3 T.R. 80), *Boehm v. Sterling* (7 T.R. 423), *Charles v. Marsden* (1 Taunt. 224), *Byles on Bills*, 122-3, 10 B. & C. 588, *Field v. Allen* (9 M. & W. 696).

McLEAN, J., and RICHARDS, J., concurred.

MILLS V. DIXON.

Declaration in case alleged that defendant's dam was constructed in a careless, improper, unsafe, unskilful, and inartificial manner, by means whereof, &c.

Held, That the omission to provide necessary waste-gates to facilitate the passage of the surplus water in freshets or floods, is evidence of misconstruction, or improper or careless construction.

CASE. *Declaration.*—That plaintiff was possessed of a mill and distillery, &c., and by reason whereof, and at the time when, &c., of right ought to have and enjoy the benefit and advantage of a certain dam of plaintiff's, erected across a certain stream or water-course which ran and flowed to the said mill and distillery, for supplying the same with water, by means of the said dam for the working thereof. Yet defendant, well knowing, &c., wrongfully and injuriously placed and erected a dam or weir in and across the said stream, above the plaintiff's mill and distillery, of wood, earth, &c., in such a careless, improper, unsafe, unskilful, and inartificial manner, and with such frail, insufficient, and improper materials, that by means thereof the said dam of defendant was insufficient and unable to resist the force and current of the stream above defendant's said dam, of which he had notice, by means whereof and by reason of the careless, &c., manner, &c., in which the defendant's said dam was erected, it was carried away by the force and current of the said stream, and the water forced back thereby, with logs, rubbish, &c., rushed down and upon the plaintiff's dam, mill, and distillery, whereby plaintiff's said dam was carried away, &c.

Plea, not guilty.

The plaintiff proved his possession of said mill and dam for three or four years past, about three quarters of a mile lower down the stream in question than the defendant's, which had been only erected last year; that on the 13th of April 1853 a freshet carried away first the defendant's dam, as plaintiff contended, but defendant contended the plaintiff's dam gave way first.

At the close of the plaintiff's case, the defendant's counsel objected that there was no evidence that the defendant's dam had been constructed of bad materials, or insufficiently built, &c., as alleged in the declaration, that the only cause of injury alleged was the want of a sufficient waste-gate, which should have been specially charged to be the cause of the injury.

The honorable the Chief Justice of the Court of Queen's Bench, who tried the cause at the last fall assizes for the united counties of Middlesex and Elgin, ruled that not providing sufficient means for the escape of the surplus water, so as to allow for freshets, was to build the dam in a careless and improper manner, as alleged; but the case went to the jury with the question reserved, whether there was any evidence to go to the jury of the injury as charged.

At the end of the defendant's evidence, the jury were told,—that the case required very careful consideration; that the plaintiff's right to recover depended on, first, whether defendant's dam in fact did give way before plaintiff's; second, whether defendant's dam gave way because insufficiently constructed, or would at any rate have gone; third, whether its giving way was really the cause of plaintiff's dam giving; fourth, whether the plaintiff's dam was itself properly secured; fifth, whether reasonable care was used by plaintiff to meet the freshet and let the water escape, remarking on the evidence as applicable to these points and to damages, should the verdict be for plaintiff, and laying stress upon the fact of streams entering the creek between plaintiff's and defendant's dams as material on the question of which gave way first, also, of no one being present at plaintiff's mill to take necessary measures to avoid disaster, though evidently proper to take precautions.

The jury were told they must be quite sure the defendant's dam gave way first, because unless it did, the plaintiff's case was not proved.

The jury found for the plaintiff, with £125 damages.

In Michaelmas term last, *Becher*, for defendant, obtained a rule calling on plaintiff to shew cause why the verdict should not be set aside, or a non-suit entered, or for a new trial without costs, or costs to abide the event, on the ground that the verdict was contrary to law and evidence.

Hagarty, Q. C., shewed cause during the same term, and contended that no misdirection was suggested or could be complained of.

That there was evidence that the defendant's dam gave way first, and that the additional body of water which escaped in consequence contributed materially to the destruction of the plaintiff's dam.

That the insufficiency of the dam was not merely narrowed to the want of waste-gates, and that if they were not sufficient, the dam was insufficient in consequence.

Becher, in reply said, there was a large hole in the plaintiff's dam, which weakened it and facilitated its destruction during the great freshet which caused it.

He contended the evidence did not support the declaration, which averred negligence on defendant's part in the construction of his dam, and which formed the gist of the action, and was not proved; the declaration admits the defendant's right to erect the dam where it was, and only denied its sufficiency.

That the only objection urged at the trial and relied upon was the want of a proper waste-gate, which was no part of the dam, and the omission to provide the same, no proof of negligence in the construction of the dam, or the insufficiency of the materials, as alleged in the declaration. He relied strongly on the want of proof that the defendant's dam gave way before the plaintiff's, and pressed for a new trial at all events, and on any ground, in order to enable the defendant to contest the matter again.

Hagarty, in reply said, the defendant's conduct was immaterial, and that unless he constructed a dam of sufficient

strength to resist the pressure of the water thereby impeded in its natural flow, whereby the plaintiff's dam was forced away, he was liable, and that the event proved the insufficiency of the work in respect of materials or workmanship, or both; and submitted that there was evidence of defendant's dam having failed first.

MACAULAY, C. J.—I have consulted the learned Chief Justice who tried this cause, and he says that although he would have been quite as well, if not better, satisfied with a verdict for the defendant on the question of fact which dam first gave away, still, that he considered it a question for the jury on the evidence, and could not say he since thought their decision wrong.

I do not see the force of the objection of variance in the proof as shewing that the fault in the dam consisted not in the insufficiency of its materials or the imperfection of the work, but in the want of waste-gates. If waste-gates were proper and necessary to facilitate the passage of the surplus water in freshets or floods, it appears to me the omission to provide them would be evidence of a misconstruction, or improper or careless construction of the dam. The declaration charges it to have been made in a careless, improper, unsafe, unskilful, and inartificial manner, by means whereof the dam was insufficient and unable to resist the force and current of the stream above it, &c.; the omission of the necessary and proper waste-gates would seem to afford proof in support of the above allegations. The declaration moreover, is comprehensive enough, I think, to admit evidence showing the insufficiency of the dam in materials or workmanship in any other respects.

The plea of not guilty does not put in issue the matter of inducement, but denies only the wrongful act alleged. The case of *Frankum v. Lord Falmouth* (6 C. & P. 529; S. C. 2 A. E. 452), shews that under that issue neither the right of the plaintiff to the natural flow of the water, or of the defendant to obstruct it, or to erect a dam in the stream, are involved.

In *Benshaw v. Bean* (21 L. J., Q. B. 219; S. C. 10 Eng. Rep. 417), Lord Campbell, C. J., said:—"The case of

Frankum v. Lord Falmouth established that the plea of not guilty under the new rules put in issue only the fact alleged to have been wrongfully done, and not the wrongfulness of that fact. The case has been frequently cited and commented upon, and in some instances explained, but I am not aware that in relation to actions of a similar kind it has ever been questioned or overruled. See *Cotton v. Brown* (3 A. & E. 312), *Wright v. Lainson* (2 M. & W. 745.)

Here the defendant denies no right in the plaintiff, and sets up no right in himself; he merely traverses the wrongful act alleged. On the subject generally, I may refer to *Mason v. Hill* (5 B. & Adol. 1), *Mason v. Hill et al.* (3 B. & Adol. 304), *Drewett v. Shear* (7 C. & P. 465), *Wood v. Wand* (3 Ex. R. 748), *Embrey v. Owen* (6 Ex. R. 353), *Dickinson v. Grand Junction Canal Co.* (7 Ex. R. 299-300.)

There is no evidence that the defendant had acquired a right to erect and maintain his dam as against the plaintiff, by reason of upwards of twenty years of undisturbed enjoyment, and if the fact were so, some of the cases would seem to shew that to entitle the defendant to go into proof thereof, he should have traversed the plaintiff's right in manner and form alleged. *Brown v. Best* (1 Wil. 74), was before the new rules, but the principle applies—*Ward v. Robins* (15 M. & W. 237), *Peter v. Daniel* (5 C. B. 568), *South Shields Water Works Co. v. Cookson* (15 L. J. N. S. Ex. 315.)

The defence does not rest upon a right acquired by grant or long enjoyment as of right, nor upon a right within twenty years to erect such a dam, doing no injury to the plaintiff by withholding the water, &c.; and the injury caused by accident arising from an unforeseen, unexpected, and unusual sudden emergency, proceeding from natural causes and beyond the defendant's control, wherefore he was not responsible for the damage done to the plaintiff.

The plaintiff rests his claim to damages upon his alleged right to his dam across the stream, and the insufficiency of the defendant's dam wrongfully so erected higher up upon the same stream; the defendant not disputing the plaintiff's right as alleged, denies the wrongful act imputed to him

in the declaration. Under such denial it might be open to him to prove that it was the sudden effect of the elements that caused his dam to be carried away; but still that would not rebut the charge that his dam was wrongfully or insufficiently built to resist the action of the elements. Moreover, its destruction did not arise from causes not to be anticipated and provided against, like an earthquake or other convulsions of nature; freshets or floods, caused by rains or the melting of the snows in the spring of the year, are of annual occurrence, and constitute one of the greatest vicissitudes against which mill owners are obliged to provide in the construction of their dams. See *Smith v. Whiting* (3 U. C. Q. B. R. O. S. 597).

In 16 Vin. Ab. 26 Nuisance, sec. 7, it is said: "If I have a mill by prescription in my soil, and another erects a new mill upon his soil, by which the stream to my mill is straightened or stopped, or by which too great abundance of water comes to my mill, by which my mill is endangered, so that my mill cannot grind so much as it was wont, this is a nuisance to my mill." Citing 22 H. VI.—14.

It seems to me to come within the dictum of Gibb, C. J., in *Sutton v. Clark* (1 Taunt 44), of which case he said:—"It is perfectly unlike that of an individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor: if he thereby unwittingly injure his neighbor, he is answerable."

When the narrow effect of the plea is considered, and there being evidence sufficient to go to the jury to prove all that such plea threw upon the plaintiff—namely, the erection of an insufficient dam which gave way—whereby the plaintiff's dam was also destroyed—and the jury having found against the defendant, and for damages, not unreasonable in reference to the injury sustained by the plaintiff, it is difficult to point out any ground on which a new trial could be granted; a contrary result upon another trial would be quite as unsatisfactory. The learned Chief Justice left the case fairly to the jury, with a clear charge touching all the material points that arose upon the evidence, and with

guarded care in pointing out how the evidence bore against the plaintiff and in favor of the defendant, as well as in the plaintiff's favor against the defendant.

McLEAN, J., and RICHARDS, J., concurred..

Rule discharged.

THE TRUSTEES OF SCHOOL SECTION No. 2, OF THE TOWNSHIP OF DUNWICH V. GEORGE McBEATH, EXECUTOR OF THOMAS TALBOT.

School rate—Corporation.

A resolution of the freeholders and householders of a school section, passed at their annual meeting, that the trustees should tax the property in such section to pay the teachers' salary, &c., followed by a resolution of the trustees of such school section directing a rate to be levied on the ratable property in said section to raise the sum required, and the preparation of rate bills &c., is sufficient to render a non-resident having real estate within such section liable for the sum rated by the school trustees of such section according to the assessed value of his real property; and that being so liable, defendant, as his executor and representing his estate, is liable in an action of the same nature to which the testator might have been subjected. A corporation aggregate is not bound to appear at the trial as witnesses, under a notice served on their attorney, under statute 16 Vic. c. 19 sec. 2.

DEBT for £21 8s. Declaration states that after the provincial statute 13 & 14 Vic. c. 48, it was decided upon by a majority of the freeholders and householders of the said school section, duly assembled at the annual school meeting of the said section &c., that the salary of the teacher and the expenses for fuel for the common school of said section for the year 1851, the then current year, should be provided for by a tax upon the property in the said school section; and the majority of the said freeholders and householders &c. thereupon desired the plaintiffs to tax the property in the said school section, and employ all lawful means to collect the sum required: that £100 was required. Whereupon *plaintiffs made a rate or tax* for the year 1851 of one penny and three-fifths of a penny per pound of the assessed value of taxable property in the said section as expressed in the assessor's or collector's roll of said township, which was necessary to raise the requisite sum; which said rate was due and payable on or before the 31st of December 1851: that before and till his death the said Thomas Talbot was

a *freeholder* in the said section and seised and possessed of real estate therein, and rated (*quære*, in what year) at £3210 &c., and was rated *by plaintiffs* in £21 8s. in *respect thereof*; that the said £21 8s. was not paid when payable, though he had notice thereof, and it was demanded by the collector when payable; and that he resided out of the limits of said section; whereby an action hath accrued against the defendants as executors, &c.,

Pleas—1st. Never indebted.. 2nd. Testator never indebted. 3rd. That plaintiffs did not by a by-law under seal direct a rate *modo et forma*. 4th. That plaintiffs did not make *any* by-law. 5th. That plaintiffs did not make or impose said rate or tax. 6th. That testator as such freeholder was not liable to be rated in the said sum of £3210. 7th. That he was not a freeholder.—All the pleas concluding to the country and issues.

At the trial, before the honorable the Chief Justice of the Court of Queen's Bench, Coyne, one of the school trustees, was received as a witness for plaintiffs, though objected to by defendant's counsel, and proved a resolution passed the 8th of January 1851 at the annual meeting of the freeholders and householders as follows:—

“TYRCONNEL, *January 8th, 1851.*

“At the annual school meeting held in the school house in school section No. 2 in the township of Dunwich, the meeting was organized by electing Archibald Hamilton chairman and John Ridden secretary.

“No. 2. Moved by Thomas G. Coyne, seconded by Thomas Dewitt,—That the trustees be required to tax the property in this section to pay the teacher's salary and the expenses of fuel for this school for the year ensuing.—Carried unanimously.

“Signed, A. HAMILTON, *Chairman,*
“ [L.S.]” JOHN RIDDEN, *Secretary.*”

9th of January, 1851.

“At a trustees meeting, held this evening, on motion of John Ridden, seconded by John Pearce, Thomas G. Coyne was appointed treasurer for the ensuing year. On motion of John Pearce, seconded by John Ridden, it was resolved to employ Mr. Benson for the ensuing year at the rate of £50 per year.”

Also a by-law, passed on the 10th of January, directing the rate of one penny and three-fifths of a penny in the pound to be levied on the ratable property in this section to raise £50, or so much thereof as is necessary to pay the teacher's salary for this year.

"By-law No. 4.—It is hereby enacted by the trustees of school section No. 2 in the township of Dunwich, that the sum of £50 shall be assessed on the ratable property of this school section, or so much thereof as can be raised by an assessment of one penny and three-fifths of a penny in the pound, to pay the teacher's salary for the ensuing year.

"Passed January 10th 1851.

"Signed,

THOMAS G. COYNE.

"[L.S.]

Secretary and Treasurer."

He said it was sealed by the seal always used by plaintiffs, who had no other seal.

It was admitted that the testator was a freeholder of lands in that section, and usually resided in school section No. 1 of the same township. A rate bill for the £50 was produced, and testator rated at £3210 value of property, assessed at one penny and three-fifths of a penny, equal to £21 8s. for 1851, made up in November from the collector's roll of that year.

The amount was demanded of Mr. Becher, his agent, in his lifetime, who answered in writing, refusing to pay &c.

On cross examination, the witness said the by-law was sealed the day it passed, but though now entered in a book and sealed he could not be certain it was so entered the day of the date, or that it was sealed on that day, and could not explain an alteration in the date, nor state whether the by-law had been read over to all the trustees when passed.

The other trustees, Stafford and Pearce, were not present at the trial. The defendant's counsel objected—1st. That the by-law was illegal on the face of it. 2nd. That there was no president or chairman's signature thereto. 3rd. That non-residents were not liable. 4th. That the executor (defendant) was not liable, only the heir or devisee of the testator as running with the land only, and not being a personal debt.

These objections were overruled for the time. But the

Chief Justice did not consider the proof of the by-law at all satisfactory, and seriously doubted its being made as stated, from the way the witness answered respecting it.

On the 17th of September the defendant's attorney served a notice on the plaintiffs' attorney that upon the trial the defendant would require the plaintiffs to be *personally* present to be sworn and examined as witnesses on the part of the defendant, pursuant to the statute. The cause was tried the 1st of October. Pearce and Stafford did not appear, but the case was not taken *pro confesso* by the learned Chief Justice at Nisi Prius, and plaintiffs had a verdict for £21 8s.

In Michaelmas Term last, *Becher* for defendant, obtained a rule on the plaintiffs to set aside such verdict without costs, as being contrary to law and evidence, and for misdirection, the plaintiffs' non-appearance at the trial &c., or to arrest judgment on the ground that the declaration does not shew defendant's liability as executor, to this action, &c.

On the argument, he contended that the plaintiffs have admitted that a by-law was necessary, by setting it out in their declaration: that the plaintiffs were bound to appear and give evidence under the notice.

In arrest of judgment he contended—1st. That the by-law should be set out in the declaration.—Wilcox on Corporations, 173 sec. 425. 2nd. That it should have been averred in the declaration that defendant lived without the section.

Connor, Q. C., for plaintiffs.—That the case of *Rex v. Harrison*, 3 Bur. 1322, shews the reason for the by-law not being set out; that the by-law was held sufficient by the judge at Nisi Prius; that the 13 & 14 Vic. c. 48 sec. 12, shews how the money is to be raised, and that a by-law is not necessary; that it is not necessary that the by-law should be drawn up and signed at the meeting; that the corporation of three were not bound to attend as witnesses on notice; that the attendance of one was sufficient; that the case not having been allowed to have been taken *pro confesso* by the learned judge, his ruling cannot now be reviewed.

In arrest of judgment—That it was sufficient to aver that

defendant's testator lived out of the section.—*Adair v. Shaw*, 1 G. & D. 264; *Eton v. Echern*, 1 Chan. C. 121; *Williams on Exors.* 1351, 1385; *Stevens v. Lloyd*, 1 W B. 284; *Henningham's case*, *Dyer* 344; *Williams on Exors.*, book 2, sec. 1.

MACAULAY, C. J.—Upon reference to the provincial statutes, 13 & 14 Vic., ch. 48, sec. 6, No. 4, sec. 12, Nos. 2, 7, 8, 9, 11, and sec. 18, No. 1; also to ch. 67, secs. 1, 6, 22, 34, and 37; it appears to me that when lawfully assessed school rates become personal debts, recoverable by the summary proceedings provided in the statutes, or by action, and that as debts the right of action survives against the personal representatives of the person assessed. Such debts may also operate as a lien on the land in respect of which the rate is imposed, but the goods of the owner are likewise and primarily liable. The case of *Stevens v. Evans* (2 Bur. 1152) differs. That case seems to show there is no other remedy after the death of the principal, except against his executors or administrators.

As to what constitutes a declaring or assessing a rate, it is stated in *Steven's Municipal Acts* (p. 209), that a resolution formally adopted and followed by such steps as the statute prescribes, is sufficient; it may be tested by considering whether a distress to enforce such rate could be justified.

There appears to be a great deal of suspicion touching the by-law bearing date the 10th of January 1851, offered in evidence on the trial of this case; and if it depended upon the necessity for such a by-law, in addition to the other steps which were taken, it might be proper to grant a new trial; if antedated, it is, so far as it is of any validity, confirmatory of the rate. But I think a resolution of the freeholders and householders of the section, at the annual meeting on the 8th of January 1851, followed by the resolution of the plaintiffs on the 9th of that month, and the preparation of the rate bill, as in evidence, were sufficient to render the testator in his life-time liable, as having been rated by the school trustees of the section, for his portion of the sum

required to be raised for teachers' salary, &c., according to the assessed value of his real estate within such section. That as a non-resident, he became liable to be sued therefor as for a debt, and that the defendant, as his executor, and representing his estate since his death, is now liable in an action of the same nature, to which the testator might have been subjected.—See Brown on Actions, 347, that debt is the appropriate remedy; provincial statute 7 Wm. IV., ch. 3, sec. 11.

Then the question is, whether those allegations in the declaration which relate to the alleged by-law being rejected, the declaration would be sufficient after expunging them; rejecting those portions of the declaration, it would still appear on the face thereof that £100 was required to be raised, &c., whereupon the plaintiffs made a rate or tax for the year 1851, of one penny and three-fifths of a penny per pound of the assessed value of taxable property in the section, as expressed in the assessor's or collector's roll of the township, which was necessary to raise the requisite sum, and which said rate was due on or before the 31st of December 1851; that before and until his death the testator was a freeholder in the said section, and seized and possessed of lands and real estate therein, and rated at £3210, and was rated by the plaintiffs in £21 8s. in respect thereof; that the said sum of £21 8s. was not paid when payable, although the testator had notice thereof, and it was demanded by the collector after becoming payable, and that he resided out of the limits of the said section; then rejecting the statements respecting the by-law, and adopting the evidence given at the trial irrespective of that which related to such by-law, I think there appears a sufficient declaration sufficiently supported by proof. The third plea, however, denies that the plaintiffs by a by-law under seal directed a rate in manner and form alleged, which is an informal traverse of the by-law stated in the declaration. The fourth plea alleges that the plaintiffs did not make *any* by-law, &c., instead of traversing the one alleged, or demurring to the declaration, if not sufficiently stated. As respects these two issues, I look upon

them as immaterial, because it was unnecessary for the plaintiffs to have made a by-law, or to have stated it in the declaration, in order legally to declare the rate. I think it was sufficiently declared independently, and that the necessary averments to show that are made and proved ; and as the jury to whom the question seems to have been left have found that a by-law was made, and rendered a verdict for the plaintiffs on all the issues, and as I think the plaintiffs are entitled to maintain the action on the grounds above stated, I am not disposed to disturb the verdict.

As to the notice to the plaintiffs to attend at the trial as witnesses on behalf of the defendant, they, as a corporation, could only appear by attorney and counsel, which they did. The Chief Justice of Upper Canada, who presided at the trial, did not in his discretion decide that the case should be taken *pro confesso* against the plaintiffs for not otherwise attending, and I do not think a corporation aggregate within the meaning of the statute 16 Vic., ch. 19, sec. 2. The individual members of the plaintiffs's corporation might have been subpœnaed, if their personal attendance was required. This does not seem to have been the course adopted ; and I do not consider that a notice under the statute addressed to the attorney of the plaintiffs suing in their corporate capacity, is a call upon the several members of such corporation to attend, or that it binds them to do so at the peril of the consequences declared in that act. As to that branch of the rule which seeks to arrest judgment, I think the defendant is liable in law, and that the declaration is sufficient after verdict, although possibly open to some objections, had they been made the ground of special demurrer.

McLEAN, J.—It appears to me that the plaintiffs on the evidence are entitled to recover. It was sworn that a rate had been imposed ; and the list of the names of all the persons rated by plaintiffs for the school purposes of their section, and the amount payable by each, together with a warrant for the collection, were produced under the 12th Vic., sec. 12, sub-sec. 8., and that list, taken according to the valua-

tion of taxable property as expressed in the assessor's or collector's roll, and a warrant directed to the collector of the school section for the collection of the several sums mentioned in the list, afforded sufficient authority for the collection from all resident inhabitants without any by-law being previous passed. The raising money by a rate had previously been decided at a meeting of the school section. The property held by the testator was rated with the other property of the section, but as he was not resident in the township and had not personal property therein the amount could not be collected. Under the 11th sub-sec., of sec. 12, it is made the duty of school trustees to sue for and recover by their name of office the amount of school rates or subscriptions *due* from persons without the limits of their school section and making default of payment. The plaintiffs then had a right of action against the testator for the amount of school rate due by him, and as he died without satisfying the amount, it still remains due, and is payable by the defendant, as his executor, the same as any other money due by the testator at the time of his death.

No by-law being necessary, of course none need be set out in the declaration, and it was not necessary for plaintiffs to allege that the defendant was resident out of the limits of their school section. They were authorized by law to sue in case he did live out of the section, and that fact was proved so as to entitle them to recover.

It appears to me that no sufficient grounds have been shewn to interfere with the verdict or to arrest the judgment, and that the plaintiffs are entitled to the postea.

RICHARDS, J., concurred.

Rule discharged.

SPILLANE V. WILTON.

Declaration states that on &c. an information on oath was laid before G. M., Esq., J. P. against T. J. for having within six months sold spirituous liquors to persons therein named, but unknown to plaintiff, and contrary to the statute in such case made and provided; that said M. summoned said J., who appeared before said M., defendant, and other named justices, and that said justices having jurisdiction in the premises convicted him of said offence, and adjudged that he had forfeited 25s, whereupon it became their duty to return such conviction to the then next ensuing general quarter sessions of the peace, in and for, &c. Yet defendant, not regarding his duty and the statute, did not make a return thereof in writing to the next ensuing quarter sessions, but neglected, contrary to the statute; whereby and by force of the statute he hath forfeited, &c., and an action hath accrued.

Held, That proof of an offence against a by-law of the municipality and a conviction under such by-law was not sufficient proof of the allegations in the declaration.

Writ issued 22nd August 1853; declaration 3rd October 1853.

Declaration states that, to wit, on 1st March 1853, James Wakefield laid information on oath before Garret Mulley, Esq., J. P., &c., against Thomas Johnson, for having within six months, at the township of Peel, &c., sold spirituous liquors called whisky to persons therein named, but unknown to plaintiff, and contrary to the statute in such case made and provided. That said Mulley summoned said Johnson to appear, &c. on the 22nd of March 1853, before him and other justices; that the said Johnson did on that day appear before said Mulley, defendant, and other named justices, &c., and such proceedings were had that the said justices having jurisdiction in the premises convicted him of the said offence, and adjudged that he had forfeited twenty-five shillings, &c., whereupon it became their duty to return such conviction to the then next ensuing general quarter sessions of the peace in and for the said united counties.

Yet, defendant not regarding his duty or the statute, did not make a return thereof in writing under his hand to the then next ensuing general quarter sessions of the peace after such conviction, &c., though a reasonable time intervened, but neglected, contrary the statute, &c.; whereby and by force of the statute, defendant hath forfeited twenty pounds and an action hath accrued &c. Yet defendant hath not paid &c.

Plea, That defendant is not indebted in manner and form alleged, &c., and issue.

The defendant, being called as a witness by plaintiff, proved that he, as Reeve of Peel joined in the conviction with other justices, and that Johnson was fined £1 5s. for selling liquor without a license, and that no return of such conviction was made to the next quarter sessions that the fine had been paid and distributed as the law directs, &c. Also, that said Johnson was convicted for selling liquor without a license under a township by-law then in force, sec. 185, which was produced and proved. See 12 Vic. ch. 81, sec. 198. He said he had been elected Reeve by three members of the municipality, there being five wards in the township. No proof was given of the information as alleged nor was any conviction produced or proved otherwise than by the defendant's oral statement.

The defendant's counsel objected,

That the declaration was not proved, the conviction being for an offence contrary to a by-law, not a statute as alleged.

That the statute required the return to be immediate to the clerk of the peace, not to the next general quarter sessions as alleged, and so no default averred within the statute 4 & 5 Vic. ch. 12. That the action should be joint and against all the justices.

That the action should have been case, owing to the statute of last session.

Leave to move was reserved, and the jury found for the plaintiff £20.

In Michaelmas term last, *Lemon*, for the defendant, obtained a rule on plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered or a new trial be granted, as being contrary to law, evidence and the judge's charge.

Irving shewed cause during the same term. He referred to P. S. 4 & 5 Vic., ch. 12, under which the action was brought and to *Metcalf qui tam v. Reeve*, 6 U. C. Q. B. R. 263. That it was properly instituted against one only of the several justices who united in the conviction. He contended, as to what he understood to be the main objection, that the proof sus-

tained the averment of default in making a return to the next general quarter sessions, whence it followed that it could not have been made immediately; for if it had, that fact would have proved a return at the next sessions, because it would from thenceforth be done at any future period that might be alleged, as being done and continuing done, like the case of payment of a sum of money under a bond before the day appointed in the condition, which would enure and operate as a payment at the day, and be sufficient evidence in support a plea of *solvit ad diem*.

That the conviction being authorised under a by-law, and such by-law being made under the authority of a provincial statute, the by-law was itself a statute of the municipality and the allegation correctly made and sufficiently proved. Referring to P. S. 13 & 14 Vic. ch. 65, and 15 & 16 Vic. ch. 120, sec. 2.

Lemon, in reply, said that the only statute authorising a conviction of the kind was the I. S. 14 Geo. III. ch. 88, imposing a penalty of £10 sterling, not £1 5s. currency, the amount adjudged in this case.

That the by-law was not a statute according to the import of that term, as used in pleading—which always, unless otherwise explained, refers to statutes of paramount legislative authority, imperial or provincial. That a statute must be judicially noticed by the court, not a by-law, which must be specially stated in the pleadings.

He submitted the defendant was entitled to notice of action under the P. S. 15 Vic. ch. 54, and 16 Vic. ch. 180, but did not rely on the objection formerly made, that the action was misconceived in point of form.

He however contended that the allegations laid in the declaration, all of which were traversed and put in issue by the plea of *nil debet*, were not sustained by sufficient proof.

MACAULAY, C. J.—The statute 4 & 5 Vic. ch. 12, sec. 1, as more immediately applicable to this case, enacts that it shall be the duty of every justice of the peace before whom any trial or hearing shall be had, under any law now or hereafter to be in force, giving jurisdiction in the premises,

and imposing any fine &c. upon the defendant, in case any conviction shall ensue thereupon—to make a due return thereof in writing under his hand to the next ensuing general quarter sessions of the peace, &c., and of the receipt and application by him of the moneys received from any such defendant; and in case any such conviction shall have taken place before two or more justices, it shall be the duty of each and every of such justices being present and joining in such conviction to make an immediate return thereof, which shall be, as nearly as circumstances permit, in the form set forth in the schedule, and that the justices to whom any such moneys shall be afterwards paid shall make a return of the receipts and application thereof to the next general quarter sessions, which return or returns shall be filed by the clerk of the peace with the records in his office. The schedule is headed “Return of convictions made by me (or us, as the case may be) in the months of ——— 185 ” and in columns, the name of the prosecutor, name of defendant, nature of the charge, date of conviction, name of convicting justice, amount of fine &c., time when paid or to be paid to said justice, to whom paid over by such justice, if not paid why not, and general observations; signed A. B., convicting justice, C. and D. convicting justices (as the case may be).

Section 2 enacts, that in case any justice or justices before whom any such conviction shall have taken place as aforesaid, or who shall have received any such moneys as aforesaid, shall neglect or refuse to make such due return thereof, in the manner and form hereinbefore required, and according to the requisitions of this act &c., then &c., such justice or justices and each and every one of them, so neglecting or refusing to make such returns in the manner aforesaid, &c., shall forfeit and pay the sum of £20, together with full costs of suit, to be recovered by any person or persons who shall sue for the same &c.; one moiety of which sum shall be paid to the party suing, and the other moiety to the Receiver General for the public uses of the province.

Section 3 limits the time for bringing actions to six months &c. The present is the case of a conviction had before several justices, and not by a single justice. And the act

therefore required the immediate return thereof by such justices.

It was a conviction under a law giving them jurisdiction in the premises, and therefore legal ; in which respect it is unlike the case of *O'Reily qui tam. v Allan*, tried before me at the same assizes and disposed of in the court of Queen's Bench last term, in which the convicting justice had no jurisdiction in the premises and the conviction was therefore void, if not on the face of it, certainly under the facts and circumstances of which they took cognizance, and which could confer no jurisdiction. The present is a case therefore, in which it became clearly the duty of the convicting justices to make a return.

The first objection to the proof is that the conviction did not take place under a statute, therefore the averment in that respect was not proved.

It is to be observed that the words "contrary to the statute" are used in the inducement, wherein it is stated that an information was laid against Johnson for selling liquors "contrary to the statute in such case made and provided," but in what way contrary is not stated. The declaration then alleges his appearance ; that the justices had jurisdiction in the premises and convicted him of the said offence, referring to the offence and not to any statute otherwise than by implication. The offence was against a by-law of the municipality of the township of Peel, against the validity of which by-law no objection is raised, and the offence was not otherwise against the statute than it was against such by-law, which by-law was passed under the authority of the provincial statute 13 & 14 Vic., ch. 65., sec. 4, and 14 & 15 Vic. ch. 120, sec. 2, and imposed a less fine for the offence in question than the imperial statute 14 Geo. III., ch. 88, which is referred to in 13 & 14 Vic., ch. 65, sec. 4.

The imperial statute enacted, section 5, that the sum of £1 16s. should be paid for every license granted by the Governor to any person to keep a house of public entertainment, or for retailing wine, brandy, rum, or any other spirituous liquors within the province ; and that any person

keeping any such house &c. or retailing any such liquors without such license, should forfeit and pay the sum of £10 for every such offence, one moiety to the informer and one moiety to the Receiver General for the use of the King.

Section 5 relates to the mode of recovering penalties and forfeitures under that act, as to which see also provincial statutes 14 & 15 Vic. ch. 119, sec. 4; 6 Wm IV., ch. 4, sec. 7; 14 & 15 Vic., ch. 120, sec. 2.

At the end of section 4 of the 13 & 14 Vic., ch. 65, is a proviso, that nothing therein contained should be construed to relieve any person keeping a house of public entertainment and retailing wines and spirituous liquors therein without license from the penalty imposed for such offence by the 14 Geo. III., ch. 88. The effect is that the 13 & 14 Vic., ch. 65, is cumulative in relation to the amount payable for such license, under the imperial statute 14 Geo. III., c. 88, and that it may be that the 13 & 14 Vic., ch. 65, together with the 14 & 15 Vic., ch. 120, sec. 2, is cumulative with respect to the penalties thereby authorized. The imperial statute 14 Geo. III., ch. 88, on that head, being expressly saved, whether the penalty of £10 imposed by the imperial statute could be recovered by a summary proceeding of this kind may be questionable.

I am disposed to think the variance material; on the face of the declaration it would be inferred that the offence mentioned in the information and conviction was contrary to the imperial statute 14 Geo. III., ch. 88, in which event the defendant would have had no jurisdiction to try at all, and at all events not to convict in a penalty of £1 5s. currency, or contrary to any other statute of which the court has judicial knowledge or is bound to take judicial notice. No statute not to be judicially noticed is mentioned or set out, and there is nothing on the face of the declaration, except the amount of the fine, to lead to the inference that a local by-law and not a public statute was intended to be referred to; and as the defendant had not concurred in the conviction of Johnson under, or for, infringing any such statute, he was not with sufficient certainty apprized of what conviction the plaintiff alleged his default in making a

return. Had there been a conviction as under some statute even although without jurisdiction, according to the decision in *O'Reilly v. Allan*, and a return thereof been duly made, it would have been a good defence. This shews that a conviction under the by-law is not explicitly stated. Without reference to the by-law, I do not see for the infraction of what law or statute the conviction took place. No statute is specified and no by-law is alleged. In one sense a by-law is a statute, as being a local law passed by competent legislative authority and locally binding. It is so spoken of in the work of Angell & Ames on corporations, sec. 110; *Hopkins v. The Mayor of Swansea*, 4 M. & W. 640; 1 Bl. Com. 475-6; but not being a general or public law of which the court is supposed to have judicial knowledge, the special law or statute ought to have been more particularly specified, otherwise it does not appear that the conviction took place under any law giving jurisdiction in the premises; and if the proceeding was *coram non judice*, I certainly entertain a strong impression (with all due deference to the court of Queen's Bench in the case of *O'Reilly v. Allan*) that the defendant would not incur the penalty of £20 for not returning a conviction *de facto*, which in the eye of the law was illegal, void, and no conviction which he could not legally enforce and in enforcing which (if he did enforce it) he would become liable to an action at the suit of the party) and be bound to reimburse to him any penalty he might have thus illegally levied—Provincial statute 2 Wm. IV., ch. 4, sec. 4, and 16 Vic., ch. 180.

I do not see why so stringent a law as the 4 & 5 Vic., ch. 12 should be so stringently construed as to make each one of several magistrates liable to a penalty of £20 for not immediately making a return of a conviction in which a fine is imposed, although it turns out that the conviction was without jurisdiction and that the fine could not be legally enforced, and had not been levied, and this under a statute which in terms imposes such penalty only when the trial or hearing was had, under some law then or thereafter to be in force, giving jurisdiction in the premises.

If it rested here, I should think the plaintiff failed to prove the information and conviction in the terms of his allega-

tions, as being contrary to the statute, which *prima facie* imports an imperial or provincial statute, and not a local municipal statute as a by-law, no such by-law being mentioned, unless the reference to the statute can be rejected, (3 Car. & Kir. 8); or it is to be regarded as merely stating the charge as it was made, which if so made, was not proved, for there was no proof of either an information or conviction, except the oral statement of the defendant, and he did not allege that to have been laid or made contrary to the statute, but as contrary to the by-law of the township municipality.

Looking at the declaration only, no statute, that we can notice, giving the defendant jurisdiction in the premises and authorising a conviction in the penalty of £1 5s. has been cited. The imperial statute does not confer it, and we are not referred to a provincial act that does.

In what way the liquor was alleged to have been sold contrary to the statute, whether without license or how otherwise, or against any and what statute, or how defendant had jurisdiction in the premises, the declaration does not therefore shew.

The proof, such as it was, was a by-law infringed, and a conviction duly authorized thereby. This is not proof according to the allegations, and the distinction between a public statute and a by-law is material.

As to the propriety of suing the defendant alone, the case of *Metcalf v. Reeve & Gardner* (9 U. C. Q. B. 264) is in point in the plaintiffs' favor; but there remains the further objection that according to the proof as well as the allegations in the declaration, the conviction having taken place before several justices ought to have been returned immediately, not to the next quarter sessions.

The objection certainly appears on the face of the declaration, and is put in issue by the plea of *nil debit*. The evidence proves the allegation of a joint conviction, and it is contended that the objection to the time when the defendant ought to have returned is a mere inference of law, and not open to objection at *Nisi Prius*, however exceptionable it would have been on demurrer or in arrest of judgment.

The defendant relies upon the insufficiency of the proof

to support a case, alleging it to have been his duty to make the return to the next quarter sessions. Had the defendant proved a return duly made immediately, or had the plaintiff proved a conviction by the defendant, solely in the former case, the force of the distinction would be apparent, and the plaintiff must have failed unless an immediate return was held to be evidence of a return to the next general quarter sessions; in the latter case, if otherwise sufficient, the plaintiff might urge that the defendant, being sued alone and the breach of duty being well alleged as against a magistrate convicting singly, the allegation that the conviction was by others jointly with the defendant was immaterial and surplusage, and might be rejected.

I am disposed to think that the objection may be raised at *Nisi Prius* on a motion for a nonsuit, as it might have been raised by demurrer or motion to arrest judgment.

The plea is "not indebted in manner and form alleged." After verdict for plaintiff it might be said, that it must be intended that the plaintiff made a sufficient case against the defendant to establish his duty and liability as alleged; at all events the defendant at *Nisi Prius* might urge that the facts proved did not create the duty alleged. The onus is on the plaintiff to prove the defendant indebted in manner and form alleged—that is, by reason of the alleged breach of the alleged duty—he fails to establish the alleged duty: namely, to make a return to the next quarter sessions; the duty is not therefore established, the facts do establish a different duty—namely, to make an immediate return. How then do such facts prove the alleged breach? as a fact it was shewn the defendant did not make a return to the next quarter sessions? but how was the omission to do so a breach of the duty proved, to make the return immediately?

Before the new rules it was not unusual for objections to the plaintiff's case as made, being insufficient on grounds of exception, common both to the proof of the case as laid; and as at present advised, I think it was in strictness open to the defendant to raise the objection on a motion for nonsuit.

Tidd. Practice 917, 8th edition, states that "if it be clear in point of law, the action will not lie, the judge at *Nisi Prius* will nonsuit the plaintiff, although the objection appear on the record and might be taken advantage of by motion in arrest of judgment or on a writ of error—*Sadler v. Robins* (1 Campb., 256), *Williamson v. Watts* (1 Campb. 552), *South v. Tanner* (2 Taunt. 254), *Middleton v. Sandford* (4 Campb. 34), *Shepard v. Bishop of Chester* (6 Bing. 435. On the plaintiff's evidence the defendant moves a nonsuit and leave is reserved to move it in *banc*. upon the insufficiency of that case to support the action. If it does support it as laid, well; if not, I do not think that (if even the objection was curable by verdict) it is therefore sufficient.

In truth, the objection exists here, both on the evidence and in the declaration.

Penal actions are not within the new rules as to pleadings—21 Ja. I. ch. 4, sec. 4; and I do not see that the plea of *nil debet* in this case, not being per statute, according to the new rules on that head, can make any difference. It is a penal action and not otherwise within the new rules; moreover, if only properly objectionable in arrest of judgment, for which it is now too late to move (see rule, H. 13 Vic. No. 38), the case of *Dorley v. Roberts* (3 Bing. N. S. 835) is in favor of the rule being regarded, as if, in arrest of judgment, in the alternative; it was an action for words spoken of an attorney in the way of his profession or business, with special damage. The words were proved as laid, but the jury found "not so spoken of the plaintiff in his business of attorney, but that they had a tendency to injure him morally and professionally." A verdict was taken for the plaintiff with leave to the defendant to move a nonsuit, if the court should be of opinion that the words were not actionable unless spoken of the plaintiff in the way of his business as an attorney. A rule having been obtained accordingly, it was objected the defendant should have demurred or moved in arrest of judgment and not for a nonsuit; it was answered that as to the form of the rule the court would mould it to an arrest of

judgment if necessary, and *Tindal*, C. J., said, we must consider this case as if the rule had been drawn up for a nonsuit, or for an arrest of judgment. He said there was no ground for a nonsuit, for reasons satisfactory to shew that upon the finding of the jury the verdict should have been for the defendant, but insufficient it appears to me in arrest of judgment, if the declaration was good and no objection was made to it; he however said the defendant ought then to be permitted to move in arrest of judgment, and that judgment should be arrested.

The case before us is stronger, for the objection appears both on the evidence and in the declaration, and there was nothing to leave to a jury, as matter of dispute of fact or inference; it turned upon the legal effect of the facts proved by the defendant against himself.

The present declaration is otherwise objectionable on the face of it. It does not allege that none of the other convicting justices duly returned the conviction, and they may have done so consistently with all that is alleged, and if so I apprehend the omission of the defendant to join in such return would not in such circumstances shew a neglect or refusal on his part within the statute, for if one or more made the return containing the names of all the convicting justices, as it should do, (see schedule) it would, I apprehend operate as the return of the whole, and no jury would be likely to find the other or others liable to £20 penalties merely for not having signed the return; in truth and substance they would have returned it. *Rex v. Holland* 5 T. R. 607), *Rex v. Burrell* (12 A. & E., 460).

Then is it sufficient to allege or prove that it became the defendants duty to return the conviction to the next general quarter sessions, and that he had not done so. It was not what the law required in such case. The sessions might be several months off; and yet the law required the return to be immediate, and an action for the neglect might have arisen and been brought between the conviction and the next ensuing general quarter sessions.

It is true an immediate return proved might be evidence

of a return to the next quarter sessions when the time arrived, but the sessions might be so soon after the conviction that there was not such a reasonable time to make the return thereto as to induce a jury to find the defendant guilty of negligence or of neglecting or refusing to make an immediate return. The place of conviction and the distance from the court, the state of the roads and weather, &c., might materially affect the question of negligence.

As to the import of the word "immediately" as used.—Gillett v. Green (7 M. & W. 347), Spain v. Cadell (8 M. & W. 131), Thompson v. Gibson (8 M. & W. 282), Page v. Pearce (8 M. & W. 678), Christie v. Richardson (10 M. & W. 688), Duncan v. Topham, (8 C. B. 225).

Had another action been brought stating the case against the defendant correctly, both as to the nature of the complaint and conviction and the duty and breach thereof arising upon the conviction, and it was still pending, or a former recovery had been had thereon, could the defendant plead as such the former recovery in bar, or such pendency in abatement of this action? framed as the declaration is, they would not appear to relate to the same subject matter on the face of the pleadings. Or suppose this action to succeed (and that if not too late) another action is brought, or is now pending against the defendant for the same penalty, and that the declaration states the case correctly, could he plead a recovery had in this action in-bar thereof?

The identity of the two returns would not appear upon inspection under a replication of *nul tiel record*. It might possibly be obviated and got over by averment, but the doubt and difficulty that such a supposed state of things presents is another proof of the want of certainty and precision in the present declaration.

On the grounds therefore that the alleged information and conviction are not proved as laid, that in strictness no information or conviction at all was proved by legal evidence, and that the proof did not establish the duty alleged nor the breach of duty for which the action is brought, I think the rule should be made absolute.

McLEAN, J., and RICHARDS, J., concurred.

MCINTYRE V. STATA & CRYSLER.

Landlord—Sheriff.

A sheriff having seized goods under an execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested to do so, the landlord of the execution debtor having seized and sold the goods for rent due to him by the debtor, in an action of trover against the landlord—

Held—That the sheriff had not at the time of the distress such a possession of the goods as precluded the landlord from distraining for rent.

This was an action of trover tried before *Mr. Justice Draper* at the last assizes for the united counties of Stormont, Dundas, and Glengarry. The plaintiff, sheriff of these counties, claimed a right to recover certain goods alleged to be in his possession under and by virtue of a seizure made of them under a *fi. fa.* against the goods of one Fetterly; the same goods after such seizure being sold under a distress for rent due to the defendant Cryslar by Fetterly—Stata being the bailiff who made the distress.

It was proved by the deputy sheriff that he seized under the execution all the goods in question; that he was requested by Fetterly to leave the goods in his possession; that he assented to the request on condition of their being receipted by a responsible person, and that they should not be sold till just before the return of the writ. Fetterly procured a person of the name of David Bouck to join him in a receipt for the goods, and an undertaking under seal to the plaintiff, as sheriff, to deliver to him, his executors, administrators, and assigns, when requested by him the said sheriff, his officer or officers; they by that instrument covenanted with the plaintiff that if he should sell the goods seized by him, even after the return day of the writ, he should not be regarded as a trespasser on that account, or liable to any action for not removing the goods and chattels; and futher, that the parties Fetterly and Bouck would, at their proper costs and charges, safely and securely, *at all hazards*, keep the goods and chattels, and at all times permit the plaintiff and his officers to enter upon the premises of the defendant Fetterly, and to carry away the said goods

and chattels, or to expose them for sale, and shall suffer the purchaser or purchasers to enter upon the premises for the purpose of taking the same away, during and after such sale ; for the performance of which covenants the parties bind themselves each in a penalty of fifty pounds and ten shillings. That instrument bears date on the 11th day of May 1853, the day probably on which the levy was made by the deputy sheriff. On the 31st of May the defendant Crysler issued two warrants to Stata, as his bailiff, to distrain the goods of Peter Fetterly, on the west half of lot No. 24, in the 5th concession of Williamsburgh, for the sum of ten pounds, and the goods of William Fetterly and Peter Fetterly, on the rear of the same premises, for a like sum of ten pounds, rent claimed to be due. The goods in question were seized on the premises and sold for the rent, while in the possession of Fetterly, and subsequently the deputy sheriff demanded them from the parties who had receipted them, but they were not forthcoming. On defence, the tenancy under Crysler, and the indebtedness for rent were proved, and the seizure and sale for such rent, and a verdict was taken for the plaintiff, subject to the opinion of the court whether after the sheriff had seized and had receipted the property, leaving it, after getting the security of the receipt, in the execution *debtor's possession*, and while the sheriff had advertisements for the sale under the execution current, the landlord is in law entitled to distrain for rent :—if so, a verdict to be entered for defendant.

In Michaelmas term last, *Richards*, for plaintiff, obtained a rule calling on defendant to shew cause why the postea should not be delivered to plaintiff, &c.

Brough, for defendants, shewed cause during the same term, and contended that the sheriff had not such a possession of the goods as precluded the defendants from distraining. He cited *Gordon v. Harper*, 7 T. R. 9 ; *Wilmhurst v. Bowker*, 5 Bing. N. S. 551 ; *Owen v. Knight*, 4 Bing. N. S. ; *Payne v. Whittaker*, R. & M. 99.

Richards contended that there was an actual seizure of the goods by the sheriff, who advertised. *Wharton v. Naylor*, 12 Q. B. 673 ; *Peacock v. Purvis*, 2 B. & B. 362.

MACAULAY, C. J.—Without being understood to decide that the defendants had any right to distrain at all, but assuming it, or else regarding them as mere wrongdoers against the tenant in possession, the following cases shew, I think, that the plaintiff had not such a possession of the goods at the time when, &c., as would enable him to maintain this action.—*Blades v. Arundale* (1 M. & S. 711), *Jackson v. Irvin* (2 Camp. N. P. C. 48), *Swann v. Earl of Falmouth* (8 B. & C. 456; S. C. 2 M. & R. 554), *Bradley v. Windham* (1 Will. 44), *Shipwick v. Blanchard* (6 T. R. 298, 300), *Hutchins v. Scott* (2 M. & W. 809), *Ackland v. Poynter* (8 Price 95; Holt N. P. C. 335), *Smallman v. Pollard* (6 M. & G. 1001), *Peacock v. Purvis* (2 B. & B. 362; S. C. 5 Mod. 79), *Wright v. Dewes* (1 A. & E. 641), *Wharton v. Naylor* (12 Q. B. 673), *Beleher v. Patten* (6 C. B. 608), *Doker v. Hasler* (2 Bing. 479).

The plaintiff relinquished the actual possession of the goods upon receiving the undertaking of the debtor and his surety, and must have relied upon that for indemnity; the debtor might afterwards have maintained trespass or trover against a wrong-doer founded on his possession and right of possession until demanded by the plaintiff—*Bradley v. Copley* (1 C. B. 685), *Cooper v. Willonatt* (1 C. B. 672), *Fenn v. Bittlestone* (7 Ex. R. 152).

The instrument says the goods were to be delivered to plaintiff when requested, and the whole tenor of it repels the inference that the plaintiff was, or supposed he was, continued in actual possession. The bailees were not his mere servants or bailiffs, but clothed with an exclusive and independent possession. In short, upon the security given that the goods should be forthcoming when requested, they were restored to the possession of the debtor—*McMartin v. Powell* (Easter Term, 3 Victoria) was, I think, a case much in point upon the question of possession.

The question does not arise *inter partes*, but it is a conflict between a landlord and a stranger and the plaintiff, and I think the rule should be discharged.

MCLEAN, J.—It is shewn by the facts of this case that Crysler, the landlord, was entitled to claim the rent for which the goods were distrained and sold; and had he, after the

levy by the sheriff, given notice of the rent in arrear, it would have been incumbent on the sheriff to pay a year's rent before removing the goods, had they remained on the premises in the actual custody of the sheriff. The seizure, under the execution would, in such case, be valid, and would entitle the sheriff to hold the goods subject to the claim for a year's rent—Wharton v. Naylor (12 Q. B. 673.) If in the *actual* custody of the sheriff, the landlord could not take them out of such custody by a distress. The question then is, were the goods in *custodia legis* by virtue of the execution in the sheriff's hands at the time of the distress and sale by the defendant. It appears to me that the goods were left in the possession of the owner when they were receipted by Fetterly and Bouck, who acknowledged to have received them from the sheriff, and bound themselves to deliver them to him when requested. The sheriff did not constitute Fetterly and Bouck his officers to remain in custody and charge of the goods; on the contrary, these parties entered into a contract with the sheriff, on his agreeing to leave the goods in the possession of the owner till within a short time of the day of sale, that they would deliver them up again to him when required, and that the sheriff should not be considered as a trespasser, should he even sell the goods after the return day of the writ.

It appears to me, under the terms of this contract, that the sheriff had not at the time of the distress such a possession of the goods as precluded the defendant Crysler from distraining for his rent, and that trover cannot therefore be maintained for the goods, which were rightfully distrained.

The sheriff would, no doubt, be entitled, under the terms of the contract, to resume possession of the goods, and to sell them under the execution, had not the distress taken them from the custody of the owner. But in the present state of the case, it appears to me that his only remedy is against the parties who failed to deliver the goods to him according to their contract when requested to do so.

RICHARDS, J., concurred.

Rule discharged.

GEORGE E. CASTLE v. HENRY RUTTAN, SHERIFF, &c.

Execution—Sheriff.

A sheriff having seized the goods of a debtor, under an execution, took a bond for the delivery thereof when required by the sheriff, and allowed the debtor to remain in possession of the goods and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor was received by the sheriff, to which he returned *nulla bona*.

Held, in an action against the sheriff for a false return, that the second writ took precedence of the first and bound the goods, and that therefore the sheriff was liable.

Writ issued 8th September : Declaration, 16th September, 1853.

First count.—That plaintiff obtained judgment and issued execution against the goods of Pringle to defendant, sheriff, &c., who seized the goods of Pringle and levied the amount thereout; yet defendant did not pay, &c., but falsely returned £4 9s. 3d. made, and no goods as to residue.

Second count states the judgment and execution, and that said Pringle had goods of which defendant might and ought to have levied the amount; yet defendant only levied £4 9s. 3d., and returned falsely no goods as to residue.

Pleas—First, not guilty. Second, to first count, did not levy except the said £4 9s. 3d. Third, to second count, that there were not any goods of said Pringle of which he had notice whereof he could have levied the money endorsed on plaintiff's writ, &c. Fourth, to first count, that with the plaintiff's leave and license he had not the money, &c. Fifth, to second count, similar to the last, and issues.

It appeared in evidence that on the 11th September, 1852, an *alias fi. fa.*, at the suit of Alexander Urquhart against the goods of James Pringle, tested the 30th August, 16th Victoria, issued out of the Queen's Bench to the defendant, as sheriff of Northumberland and Durham, returnable the last day of the then term of Trinity, for £303 10s. 2d.; endorsed to levy £181 15s. 0d., less £25 paid on 1st September, 1852, interest; £3 10s. 3d. costs,

and £2 3s. 9d. for writs, fees, poundage, &c., received by defendant on the 11th September, 1852.

That under this writ the goods of Pringle, in his druggist shop and his household furniture, were seized by the defendant's deputy, who took a bond for the same, in which Pringle, George Buck and Arthur McBean were obligors to the defendant, sheriff, &c., in the penal sum of £300, dated 11th September, 1852, condition (after reciting that the said sheriff had that day, under the aforesaid writ of *fi. fa.*, levied upon as the property of the said James Pringle, all the stock in trade of the said James Pringle then in his store, in the town of Cobourg, also all the household furniture in the house over the same store), that if the said obligors shall deliver the said property, or cause it to be delivered to the said sheriff, or such person as shall be authorised to receive the same, and at such place and at such time as shall by such person be pointed out for the delivery thereof, to be sold under the said writ or any other writ which the said sheriff may then have, then to be void, &c.

Upon this the defendant's deputy seems to have withdrawn, and Pringle continued in possession and carried on his business as before. Afterwards another *fi. fa.* was received at the suit of Lyman against Pringle's goods, the amount of which the present plaintiff advanced to relieve said Pringle, whose business continued as before, until the 19th March 1853, when the defendant received a *fi. fa.* out of the Court of Queen's Bench, tested the 19th February, issued the 19th March 1853, at the suit of plaintiff against the goods of James Pringle for £303 9s. 9d., returnable the first day of Easter term then next, endorsed to levy £200 debt, £3 9s. 3d. costs, &c.; returned made £4 9s. 3d. and no goods for residue; when this writ was received £147 remained due on Urquhart's writ, and afterwards the defendant sold the goods of Pringle, which realized £158 7s., the plaintiff through his attorney, being the purchaser of all the goods for his own protection, as his attorney stated.

The deputy sheriff stated that he made the seizure by

going to the shop and taking the goods under instructions, in the first instance to make the amount; afterwards the plaintiff's attorney (plaintiff Urquhart being in Montreal,) did not press the execution, but said he would give no stay of it; that he the deputy understood Pringle was making quarterly payments to the plaintiff Urquhart's attorney, and receipts were put in from him, the first dated 5th October 1852, for £25 on account of debt in that cause, the other dated 18th January 1853, for £25 on account of *fi. fa.* in this cause. That the intermediate execution at the suit of Lyman was paid by plaintiff's attorney, by his direction, and constituted as was understood, the debt for which plaintiff obtained judgment and execution as afore-said. The plaintiff's attorney denied any knowledge of a prior execution being in the sheriff's hands when the plaintiff satisfied Lyman's writ; that the deputy sold under both writs, and was indemnified by Urquhart.

It was supposed some understanding existed between Pringle and McBean (one of the obligors in the bond), as agent of Urquhart, that Pringle should make quarterly payments; but the plaintiff's attorney denied any concert with McBean and had refused to recognize him as such agent, and would have nothing to do with him in the matter. He denied any understanding that there should be any stay of proceedings, or that there ever was any. That in the winter the plaintiff Urquhart wrote for the money, and upon and from the first of March, his attorney was urgent for the sheriff to realize the amount. The plaintiff's attorney was aware of Urquhart's execution before the plaintiff's was placed in the defendant's hands, and since the sale to and purchase by the plaintiff have remained in Pringle's hands as his agent.

The learned judge who tried the cause (Burns, J.,) thought the plaintiff failed, as the defendant had not abandoned the goods after seizure, and the debtor Pringle continuing business after did not alter the case.

It was then agreed the jury should find for defendant, with leave for the plaintiff to move to enter the verdict for plaintiff for £146 11s. 0d. if entitled to recover. If not, but if upon

a correct calculation the sum realized over and above Urquhart's balance exceeded £4 9s. 3d., a verdict was to be entered for the plaintiff on the first count for the difference, and to stand for defendant on the second count.

In Michaelmas term last, *Vankoughnet*, Q. C., for plaintiff, obtained a rule upon the defendant accordingly.

Wilson, Q. C., shewed cause the following term, and contended that the sheriff is not bound to maintain a manual possession, that a very slight possession is sufficient to continue the priority to the first execution creditor, the goods were clearly in his custody, and when he takes a receipt the property is vested in him by the seizure, and he takes the property when he chooses.—*Doe Harley v. McManus*, 4 U. C. Q. B. R.

That Urquhart is not shewn to have done anything to prejudice his claim, that there is no direction in his part to the sheriff to stay his execution.

That a mere acquiescence on the part of the creditor to a lenity, granted the debtor, should not prejudice his claims.

That the question of abandonment is a matter of evidence.—*Blades v. Arundale*, 1 M. & S. 711; *Ackland v. Poynter*, 8 Price. 95; *McGinnis v. McMartin*, 1 N. C. 145.

Vankoughnet, for plaintiff contended that the question is not between Urquhart and this plaintiff, but between the sheriff and the plaintiff; that the sheriff was not in possession of the goods at the expiration of the writ; he had no actual possession; and that there is no possession shewn by operation of law.

That the sheriff never had any control from the time he seized until the second execution was put in.

That the sheriff is bound to take an actual and public possession, and has no right to allow an execution debtor to deal with goods seized under an execution.

That the plaintiff Urquhart, as matter of law, authorised the sheriff to act as he did; that he was aware the execution debtor was continuing the business, &c., and that not compelling the sheriff to proceed was legally consenting to the sheriff's proceedings; and either the sheriff was acting with his consent or illegally: in the latter case it makes it still stronger against the sheriff.

That the execution had expired before it was up and the property sold under it; and even if it had not expired, there was no possession under it. He referred to the cases cited by Wilson, and to *Wright v. Semey*, 3 Doug. 340; *Doe Greenshields v. Garrow*, 5 U. C. Q. B. R. 280; *Doe Cameron v. Robinson*, 7 U. C. Q. B. R. 335.

MACAULAY, C. J.—It seems quite clear by the authorities that if the plaintiff Urquhart had expressly assented to the delay which took place under the circumstances in evidence, his writ of execution would have lost its place and been superseded by the plaintiff Castle's writ; even if both were still current, it would give rise to the question, whether it was not fraudulent against another creditor, as was held under circumstances of that kind in the case of *Ross et al. v. Hamilton*.—(See note.)

NOTE.—The judgment in this case was delivered in the Court of Queen's Bench, in Easter term 3 Vic., but not reported. Owing to the importance of the case, and its analogy to the case of *Castle v. Ruttan*, it is thought expedient to insert it here.

ROSS ET AL. V. HAMILTON.

This is an action of covenant, brought against one of the sureties of the late sheriff of Niagara after his death, on the deed of covenant executed by him, with his sureties jointly and severally, according to the form prescribed by 3 Wm. IV. cap. 9, in schedule B. subjoined to that act. The breach of covenant assigned by the plaintiffs is in substance that the late sheriff misconducted himself in his office to their damage, by returning *nulla bona* to a writ of *fi. fa.* issued at their suit against one Balfour & Drysdale, when he should have returned the writ satisfied together with the full amount of debt and costs. The cause was tried at the last assizes for this district, when a verdict was taken for the plaintiffs of £74 4s., subject to the opinion of this court on the following points:—1. Whether the personal representative of the late sheriff of the Niagara district should have been joined in this action. 2. Whether the evidence given by the plaintiffs at the trial discloses facts sufficient in law to sustain their suit.

It was proved by the plaintiffs, that they delivered to the late sheriff a writ of *fi. fa.* in their favor, issued from this court against Balfour & Drysdale, on the 22d of November 1838, with directions to proceed in its collection. They also proved that Balfour & Drysdale had sufficient goods in their possession at the time to satisfy their writ, which was returnable on the first day of Easter term following, about the middle of the ensuing month of February. The plaintiffs further proved that the late sheriff made a return of *nulla bona* on their writ. It was then proved on the part of the defendant, that Mr. Hall, who was the attorney for three other judgment creditors, delivered to the sheriff three executions against the goods and chattels of Balfour & Drysdale, one on the 1st of November, and two on the 7th of November, and consequently there were three writs of *fi. fa.* in the hands of the sheriff against Balfour & Drysdale before the plaintiffs' writ was sued out. The first three writs were returnable on the same day the plaintiffs' writ was returnable, and it was proved that Balfour & Drysdale

Here, however, the plaintiff Urquhart's writ had been long returnable ; and although he did not expressly assent

never had sufficient goods and chattels after the 1st day of November 1838 to satisfy the first three writs, so delivered to the sheriff prior to the delivery of the plaintiffs' to him.

SHERWOOD, J.—With respect to the first objection taken at the trial—namely, that the personal representative of the late sheriff should have been joined as a party with the defendant in this action—it is quite clear such a joinder could not take place conformably to the rules of the common law. As the covenant is both joint and several the executor might be sued alone, but he could not be sued with the survivor of the joint contractor, because there must be different judgments. The one against the former would be *de bonis testatoris*, and the one against the latter *de bonis propriis*; therefore no joinder of such parties could take place, unless the stat. 3 Wm. IV. cap. 9, under the provisions of which the deed of covenant was given, will sanction such a proceeding. The 16th section of the act declares that when any judgment is recovered on the deed of covenant, the plaintiff in such case, or his attorney, shall, by an indorsement on such writ, direct the coroner to levy the amount thereof upon the goods and chattels of the sheriff in the first place, and in default of such goods and chattels to satisfy the amount; then that the same or the residue thereof shall be made of the goods and chattels of the other defendants in such suit, and so in like manner with any writ against the lands and tenements.

The 21st section of the statute enacts that the sheriff shall be joined in any action on the deed of covenant against all or any of the sureties. These were the only parts of the act which were cited by the counsel for the defendant, in support of the first objection, and which are at all applicable to it, and I think the meaning of the legislature in making the enactment was, that the sheriff should be joined in all actions brought on the deed of covenant, when it is possible to join him. General words in a statute must receive a general construction, unless there is in the statute itself some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment (17 Ves. Jr. 91). The words of the statute in this case are, "that the sheriff shall be joined," not that his executor or administrator shall be joined with the sureties when they are sued; and no such construction of the words of the act can be reasonably made, because the legislature have not authorised any form of judgment against the personal representative different to the common law judgment. Another conclusive reason against any such construction of the statute is, that no action can be brought against a deceased person. It is legally impossible, and *lex neminem cogit ad impossibilia*, and therefore I think there is nothing in the first objection.

With regard to the second point—namely, whether the evidence given by the plaintiffs at the trial discloses facts sufficient in law to sustain their suit—the plaintiffs contend the first three writs of *fi. fa.* delivered by Mr. Hall, the attorney for the plaintiffs in all those actions, were fraudulent and void, as regards the execution of the writ of *fi. fa.* subsequently delivered by them to the sheriff, in consequence of the directions which the attorney gave the sheriff for his guidance, and the consequent conduct of the sheriff in pursuance of them. They insist the sheriff was legally bound to satisfy their writ from the sale of Balfour & Drysdale's goods, in preference to the first three writs. In other words, that the course which the plaintiffs on those writs pursued had the effect to deprive them of the priority which they would otherwise have possessed over the plaintiffs' execution. This is the point in dispute between the parties, and it will be necessary to examine that part of the evidence which bears upon it. Mr. Hall, the attorney for the creditors on the first three writs, was called by the plaintiffs as a witness, and he stated, in substance, that the directions which he gave the sheriff on delivery of the writs, were to levy and then leave the goods with

to the delay, or to accept the debt by instalments, and although his attorney declared that he would not so consent, still it is clear the plaintiff's attorney knew the

Balfour & Drysdale to sell, and pay over the proceeds on those writs. The sheriff left the goods with Balfour & Drysdale, who were merchants in trade, from the 7th of November to the 30th of January following, and in the interim they sold £111 worth of the goods, in their usual course of business, and paid the amount to the sheriff. Perry, another witness examined at the trial, proved that the first three writs of *fi. fa.* were not to be acted upon till other executions came in against Balfour & Drysdale. It appeared also in evidence that the sheriff did not take actual possession of the goods till the 30th of January, but that he had no instructions on the part of the plaintiffs to delay proceedings on their execution.

The plaintiffs have cited two cases to show that the first three writs of *fi. fa.* must be considered fraudulent and void as far as regards the writ of *fi. fa.* issued in this case in their favour, on account of the directions given to the sheriff by the attorney of those creditors, to delay proceedings on those writs, and on account of the delay which actually took place in consequence of such directions. The first case in order of time is Pringle v. Isaac (11 Price 445) where the attorney of a judgment creditor delivered to the sheriff a writ of *fi. fa.* returnable on a day certain, with directions by letter not to execute it till the return, unless another execution should come in the meantime, and afterwards sent in an alias *fi. fa.* with similar directions. Another writ of *fi. fa.* in favor of another plaintiff was brought to the sheriff after the alias, and he executed the last writ first, and returned it satisfied, and returned the remainder of the money which he levied by sale of the defendants' goods on the alias *fi. fa.*, which did not satisfy it, and the sheriff returned *nulla bona* as to the residue of the debt due on the alias writ. An action for a false return was brought against the sheriff by the alias *fi. fa.* creditor, on the ground that his writ was first delivered to the sheriff and should have been first satisfied. The Court of Exchequer held the action could not be maintained, and that the case came within the principle laid down in the *nisi prius* case of Kempland v. Macaulay (Peak's Nisi Prius Cases 66), where the plaintiff's attorney having written to the sheriff directing him not to levy under his writ till a future day, Lord Kenyon held that in such a case the sheriff might execute another writ coming to his hands in the meantime, because the sheriff was not to keep the first writ hanging over the heads of other creditors, but ought to levy under the last execution, as if no other had ever been delivered to him. The other case cited by the plaintiffs is Lovick v. Crowder, sheriff of London (8 Bar. & Cres. 132). In that case an execution against the goods of the defendant was delivered to the sheriff, who seized the goods and held possession of them, but the execution creditor directed the sheriff not to sell; and the defendant had the control of his goods, and carried on his business as a merchant with them for nearly eight months after the sheriff seized them, when another execution creditor sued out a *fi. fa.* and delivered it to a succeeding sheriff to execute. The Court of King's Bench held that the sheriff was bound to levy under the second writ, and that the first writ must be considered fraudulent as regarded the second. There is another case not cited on either side, which I consider to have been determined on the same principle with the two preceding cases, that is, *Doker v. Hasler* (2 Bing. 479), which was an action against the sheriff for a false return of *nulla bona* to a *fi. fa.* The plaintiff's attorney upon issuing execution wrote to the sheriff's officer, directing him to leave the defendant's mother, or any one else, in possession of the defendant's goods, and to allow his business to be carried on as usual, which was accordingly done from the middle of April till the 28th of June following; there is also the case of *Smallwood v. Buckingham* (1 Salk. 320), and *Bradley v. Wyndham* (1 Wills. 44), which tend to a similar result, and upon which the others are based.

I think the case now before the court ranges under the same class of

present defendant was temporizing and granting delay, and there is room to contend that the plaintiff's attorney by his acts and conduct did in effect acquiesce therein, although in words he refused to do so. The cases of *Pickard v. Seers*, 6 A. & E. 469; *Geg v. Wells*, 10 A. & E. 90; *Freeman v. Cook*, 2 Ex. R. 654., S. C. 12 Ju. 777, bear upon this point.

But, whatever might be the effect of the plaintiff or his attorney's interference, or forbearance to interfere, the question here really is, whether the goods were in the custody of the law when the plaintiff Castle's writ was received. The bond in this case is not precisely similar to the instrument taken by Mr. Sheriff McIntyre (*see ante* p. 248), but it is, as respects this question, the same in effect. It shews, I think, that on receiving it the defendant withdrew from the custody of the goods and relinquished the seizure, although he did not mean to abandon the writ. If the plaintiff Urquhart's writ was not returnable when Castle's writ was received, I dare say defendant might have levied again under both and have sold under Urquhart's as having priority over Castle's. But it had been long returnable, and after what had occurred the defendant could not seize *de novo* under it without committing a trespass; he might very likely be able to justify an entry and taking and selling the goods under the terms of the bond, but not under the writ irrespective of the bond.

If no other writ had intervened, and the goods had been delivered to him on demand, he might probably have sold them under the writ as again attaching upon them by consent of all parties interested; still I do not see that as the facts were, the defendant could, after the receipt of Castle's writ, demand and receive the goods under the

cases, and comes within the same rule of law. When the attorney for the three execution creditors prior to the plaintiffs directed the sheriff to allow Balfour & Drysdale to remain in possession of their goods, and carry on their mercantile business as usual, I think they waived the priority which the law gave to their writs over the plaintiffs' execution, and resigned their place to the plaintiffs. The sheriff was then bound, as a public officer, to proceed with the execution of the plaintiffs, without adopting in the least degree the terms proposed by the attorney of the other three creditors, as related to their writs. If there had been no execution delivered to him subsequently to those three, he might have accommodated those parties without infringing on the legal rights of any one, but as the case was I think he could not. The present verdict, in my opinion, should stand.

bond and then give Urquhart's writ precedence over Castle's; they were not when Castle's writ was received in the custody of the law or under Urquhart's writ, but had been delivered up to the debtor, and the only writ under which they at that time could be legally placed in the custody of the law was Castle's.

If the plaintiff in the prior writ, by consenting to grant time or restricting the sheriff in the due execution of a writ against the goods of his debtor, would lose his place in conflict with a subsequent execution, I do not see that it is in the discretion of the sheriff, any more than of the plaintiff, to do what, if done by the plaintiff's direction, would displace his writ. The sheriff, in the absence of directions, acts upon his own responsibility; and if he adopts a course which conflicts with the rights of others, he may incur responsibility to the first execution creditor or to the second; but he has no discretion to bond the goods to the debtor or suffer him to continue the possession or use of the goods, and to prosecute his business with them as before, suspending and deferring the execution indefinitely and until long after its return without further acting upon it, and at the same time to interpose the expired writ between the writ of another creditor and the goods.

It seems to me the effect of the sheriff's conduct is the same as respects third persons, or other creditors, whether it is directed by the plaintiff in the first writ, or spontaneous on the part of the sheriff, except that where the second writ is received before the first is returnable, it might form a question as between the conflicting creditors, when the sheriff had delayed or withdrawn from the seizure at the instance of the first execution creditor, which was entitled to priority; that would not arise if the delay or withdrawal had been purely the sheriff's own act. An imputation of collusion *mala fides*, or a design to cover or screen the goods from other creditors, might be much against the plaintiff in the writ, that could not be urged against the sheriff.

It appears to me to present a different and clearer question when, as here, the defendant had relinquished the possession of the goods under the first writ, and which had

become returnable long before the receipt of the present plaintiff's writ. Some of the cases seem to me explicit on this head.—Bradley v. Windham (1 Wm. 44), Smallcomb v. Buckingham (5 Mod. 376, S. C. 1 Salk. 320, S. C. 1 Lord Raymond 251), Hutchinson v. Johnston (1 T. R. 729), Payne v. Drewe (4 East 522), Blades v. Arundale (1 M. & S. 711), Jackson v. Irvin, (2 Camp. 48, Peak 66), Holt's N. P. C. 335, Doker v. Hasler (2 Bing. 479), Lovick v. Crowder (8 B. & C. 132), McIntyre v. Stata, ante page 248, and the cases there cited.

The cases of Hutchinson v. Johnston (1 T. R. 728) and Jones v. Atherton (7 Taunt 56, S. C. 2 Mar. 375.) are not against my view; for in these instances both writs were current, and the goods were in the custody of the law. The language of Gibbs, C. J., in the last case is certainly strong; "that if the sheriff has the writ in his office, though no warrant be made on it, if he afterwards gets possession of the goods, though apparently under another writ, yet his possession shall enure to the use of the first writ, and that the goods are bound by the writ in the sheriff's hands from the time of its delivery to him. These observations are very just when both writs are still running and neither of them returnable, for both bind the goods; but a writ not acted upon until after it is returnable ceases to bind the goods—a levy under it could not be justified, and a writ under which a levy has been made before it was returnable and afterwards abandoned, appears to me to stand in a like position; the levy could not be repeated, or the goods resumed after the writ had expired. The case of *McMartin v. Powell* bears upon this point. If a sheriff does not proceed diligently to seize or to make the money after having seized the goods, he incurs a liability to the execution creditor for breach of duty. Such cases shew what is the incumbent duty of the sheriff under such circumstances.

On the whole, I feel bound to say that I think the plaintiff's writ was entitled to take precedence, and therefore that he is entitled to recover.

McLEAN, J.—It is clear to me that under any circumstances the plaintiff is entitled to a verdict. The whole

amount made by the sale of the goods was £158 7s., leaving, after the deduction of £7 6s. 9d. sheriff's fees, the sum of £151 0s. 3d. applicable to the executions. Then the amount directed to be levied on Urquhart's execution, including costs and writs and giving credit, according to the directions of the indorsement, for £25 previously paid, was £162 8s. 11d., on which two sums of £25 each had been paid to Mr. Smith before sale, reducing the amount without charging interest to £112 8s. 11d. If that amount were properly applicable to the payment of Urquhart's execution, there would still be a surplus of £38 11s. 4d., to which the plaintiff would be entitled, instead of the sum of £4 9s. 3d. which he had received.

It appears however to me that the plaintiff is clearly entitled to the whole proceeds of the goods in consequence of the abandonment of the levy under Urquhart's execution, and the plaintiff's execution thereby becoming entitled to priority. When the goods were seized on the 11th of September the sheriff, or his officer, did not continue in possession; on the contrary, they were given up to certain parties, who entered into a bond to *deliver up the property at such place and at such time* as should be pointed out by the sheriff or person authorized to receive the same, to be *sold under the said writ of Urquhart, or any other writ which the sheriff might then have*. Now the parties must have received possession of the goods to enable them to give them up; and being in their possession, the sheriff, after the return day of the execution, could have no authority to *take* the goods again into his custody: all that he could do was to demand them from the parties in whose possession they were and who had become responsible to him for them, and if they refused to surrender them he could sustain an action on their bond and recover the value; but the custody of the goods he could not regain under his execution. The execution of Urquhart being expired could not bind the goods, and though it would afford a sufficient warrant for selling them if obtained from the parties who had them in possession—if not bound by any other execution—it could not operate so as to enable the sheriff to claim the goods even from a wrong-doer or from the owner. When the

plaintiff's execution was received there was no other which could bind the goods of Pringle, but from the moment of its receipt it attached upon the goods and they became liable for the amount—no matter in whose hands they might be, not being in the custody of the law; then having so attached, that execution by which they were bound became entitled to be paid from the proceeds in preference to any other. If any instructions had been given to the defendant not to levy or to defer doing so till pressed by another execution, this case would resemble the case of *Ross and McLeod v. Hamilton*, decided in the Court of Queen's Bench in Easter Term 1841, in which the sheriff made a levy on a shop full of goods on three executions placed in his hands. He was instructed not to sell but to allow the defendants to go on as if in the pursuit of their ordinary business in selling the goods, on the understanding that they were to pay over to the sheriff the proceeds of their weekly sales. While the sheriff was acting under these instructions he received the executions of Messrs. Ross and McLeod, and he then sold and applied the proceeds to the payment of the executions first received. There was no doubt that these executions were for just debts of Balfour and Drysdale, and that nothing fraudulent was intended by the indulgence extended to them. But the court nevertheless held that the execution of Messrs. Ross and McLeod was entitled to priority, and they recovered against the sheriff for not levying and for a false return. In that case I had the misfortune to differ from the rest of the court, but the decision is not the less binding, until reversed, in all similar cases.

Though no specific instructions were given in this case to stay proceedings, and it appears from Mr. Smith the plaintiff's attorney's evidence that he declined being a party to an arrangement by which Pringle should be at liberty to pay Urquhart's demand by instalments, the execution being in the meantime suspended, there are very strong circumstances from which such an understanding may be inferred.

It appears that a prior execution had been taken out by Urquhart, on which a sum of £25 was paid to Mr. Smith on the 1st of September 1852, the judgment being apparently entered on the 20th of April 1852, from which date

interest is charged. The original *fi. fa.* was returned and an *alias* issued on the 11th of September, returnable the same day: this was placed in the sheriff's hands and a levy made, no doubt for the purpose of binding the goods. Nothing further was attempted till after the plaintiff's execution was received on the 19th of March, and in the meantime Pringle had made two further payments of £25 each to Mr. Smith. It is true that the deputy sheriff states that he had called upon Pringle and informed him that unless the amount was paid up by a particular day he would be obliged to sell his goods, and that the time had expired within a day when the second execution was received. But it is also true that the sheriff was not then in a position to resume possession of the goods. Had he obtained them for the purpose of selling them, so that they could be considered in his actual custody at the time of the receipt by him of plaintiff's execution, he would no doubt be at liberty to satisfy Urquhart's execution first from the proceeds. But he did not obtain them until plaintiff's execution attached and became entitled to priority. If the sheriff, instead of making a levy on the 11th of September had suffered the writ to expire without doing anything, he could not afterwards have claimed the goods, and they must have been liable on plaintiff's execution; then a levy subsequently abandoned so far that the goods were used and converted by the debtor to his own purposes cannot place the sheriff in any different position, so as to defeat the rights of third persons. From the manner of the levy—no inventory being taken, and the security for the delivery of the goods specifying in general terms the *stock in trade* of James Pringle at *present* in his *store* in the town of Cobourg, also *all the household furniture in the house over the same store,*" the execution being issued returnable the same day, and the delay which subsequently took place in acting on the execution with a view to enforce payment, and from the evidence of the deputy sheriff as to an arrangement between McBean, an agent of Urquhart, and Pringle on the subject of payment by instalments, and *that* arrangement to some extent carried out, it appears to me that only one inference can be drawn, and that is, that it was not intended

to sell Pringle's goods on Urquhart's execution, unless to secure a preference over the other creditors, or in case of unlooked for delay in the payment of the amount. Whether delay is given by the express direction of a party to the sheriff, or is assented to in consequence of an understanding with the debtor, can make no material difference, as it appears to me, in a case like the present: the former mode of proceeding would more obviously conclude the right to priority of the party granting delay; but the effect, I think, is the same in either case; and, though the delay in seizing may be wholly attributable to the misconduct or neglect of the sheriff, the remedy on the second execution cannot be defeated thereby.

In the case of *West v. Skip* (1 Ves. Sen. 244) Lord Hardwicke lays down this proposition:—That if a creditor by a *fi. fa.* seize the goods of his debtor and suffer them to remain long in the defendant's hands, and an ordinary creditor obtain a subsequent judgment and execution, it has been determined often that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable. A similar doctrine was laid down in the case of *Lovick v. Crowder* (8 B. & C. 132, S. C. 1 M. & R. 841), where there had been a change of sheriff between the first execution and the second; and the sheriff who received the second execution was held liable for not levying and selling under it on account of the delay which had occurred on the part of his predecessor in acting on the execution in his hands. The case of *Payne v. Drew* (4 E. 523) and the case in our own court, *McIntyre v. Stata and Crysler*, decided this term, support the same view, as well as the cases cited on the argument—*Pringle v. Isaac* (11 Price 445), *Doe Greenshields v. Garrow* (7 U. C. R. 335) and *Doe Cameron v. Robinson et al.*, ante. Under all the circumstances, I am of opinion that the plaintiff is entitled to recover the whole amount levied, and that the verdict for defendant must be set aside and a verdict entered for the plaintiff.

RICHARDS, J., concurred.

AESTER TERM, 17 VICTORIA.

Present—THE HON. JAMES BUCHANAN MACAULAY, C. J.

“ ARCHIBALD McLEAN, J.

“ WILLIAM BUELL RICHARDS, J.

WEBSTER V. MACKLEM, NICHOLSON, & WILKINSON.

Declaration on bond from O. M. and others, to E. W., collector of customs, &c., for and on behalf of her Majesty, conditioned (after reciting the seizure of certain goods belonging to said O. M., that said O. M. was desirous of bonding said goods until the decision of the government should be made thereon) that if the seizure should not within thirty days be declared illegal by the Governor in Council, that then the obligors should pay to the said E. W., collector as aforesaid, or, &c., the sum of, &c.

Held, That the bond was good on the face of it, it being taken for and on behalf of the Queen, and no prescribed form of bond having been given by the statute.

Writ issued 8th of October, declaration 18th of November 1853. Debt on bond dated 28th of October 1852, by which defendants acknowledged themselves bound to the plaintiff, collector of customs for and on behalf of the Queen, her heirs and successors. The sum demanded is £979 10s. No sum is mentioned as the amount of the bond. Damages laid at £1000.

Defendants pray oyer, and the bond is set out as dated the 28th of October 1852, and made by the defendants, described as of the village of Chippewa, county of Welland, and province of Canada, to E. Webster, of the port of Chippewa, collector of customs for and on behalf of the Queen, her heirs and successors, in the penal sum of £979 10s., to be paid to the said E. Webster, as collector for and on behalf of her Majesty, &c., and for which payment defendants bound themselves jointly and severally.

The condition (after reciting that on the 12th of October instant, at Chippewa, in the county of Welland, a seizure of a quantity of copper and tin ware, consisting of boilers, kettles and cooking utensils, was made at the warehouse of O. T. Macklem, and that he was desirous and wished to

bond the said goods until the decision of the government thereon should be made) was, that if the said seizure of the said goods, made on the 12th day of October instant, at the warehouse of O. T. Macklem, Chippewa, should not within thirty days from the date thereof be declared illegal by the Governor General in Council, that the said obligors should pay or cause to be paid to the said Ephraim Webster, collector as aforesaid, or to his successor or assigns, the sum of £479 15s., the value of the goods; and further, that if the Governor General in Council should within the time aforesaid direct that the said seizure should be released to the said O. T. Macklem, that then in that case the obligors should pay or cause to be paid to the said collectors, his successors or assigns, all expenses that had or might accrue thereon, and all such penalties thereon or forfeitures as the Governor General in Council might direct to be paid in and concerning the same: the foregoing conditions being complied with, said obligation to be void, else in full force, &c.; which being read and heard, defendants say that the said seizure was made by plaintiff as and acting as collector of customs at the port of Chippewa aforesaid, and that after such seizure and while the plaintiff held the said goods so seized as such collector, the plaintiff induced and procured the defendants to execute the said obligation with the above condition, upon the agreement and promise of plaintiff that on the execution of the same, he the plaintiff would, as he subsequently did, release and give up to the said O. T. Macklem the said goods and abandon the seizure. Verification.

Demurrer, on the grounds—1st, That the plea does not shew that the defendants in any manner performed the condition of the said writing obligatory, nor shew any excuse for the non-performance thereof.

2nd. That it is not shewn for what cause the said goods were seized, or that the same were illegally seized; nor is it alleged that the Governor General directed the said seizure to be released, or that any decision was made thereon.

3rd. That defendants are estopped from denying the legality of the seizure and bond.

Notice that defendants will contend on general demurrer that the declaration contains no cause of action, as the bond and condition thereof set forth in the pleadings is void, and is not a valid bond, nor with such a condition as the plaintiff was by law authorised to take.

On the argument, *Eccles* for the plaintiff, contended the bond was valid in law, and that the plea was bad.

That the plea is clearly bad; it sets up nothing but what is in the bond; it should have said the goods were forfeited or smuggled. For all that appears, the goods might have been in the plaintiff's possession, the duties having been paid. That the bond is not void under the circumstances which appeared on the record. The statute 10 & 11 Vic. ch. 81 enacts that forfeited goods shall be deemed condemned unless claimed as in the act specified, and that under a judge's order security may be taken by a collector; that the clause in the act as to the collector's taking security is only directory, and not having been strictly followed does not render the bond void.—*Collins v. Blantern*, 1 Smith's Leading Cases 155; *Gwynne v. Burnell*, 2 Bing N. C. 228. That for anything that appears, the bond may have been given in strict accordance with the section of the act which authorises security to be taken.

Vankoughnet, Q.C.—That it is not necessary to show that the bond was taken under the 48th section, if the bond is such that the collector could not under any circumstances have taken a bond of the kind; that if the collector had no right to take the bond it cannot be enforced; that if the bond could have been adopted by the Crown, it should have been alleged that it had been so adopted. That the 71st sec. prohibits the collector from doing the very thing that was done in this case. That if the seizure is illegal he had no right to take the bond; if legal, he had no right to release the goods seized except in the manner provided for by the 48th sec.—Com. Dig. title Officer H; *Hurlstone on Bonds*, 14; *Hescatt's case*, 1 Salk. 330; *Winch*, 20-50; Stat. 10 & 11 Vic. ch. 31, secs. 32, 48, 49, 52, 71, 75.

MACAULAY, C. J.—The statutes that principally relate to this case are the 8 Vic. c. 4, continued by the 12 Vic.

c. 2, and the 10 & 11 Vic. c. 31, secs. 48 & 75. The former act, 10 & 11 Vic. c. 31, repealed the 4 Geo. IV. c. 11; and by the 8 Vic. c. 4, sec. 5, certain powers with regard to the management of the customs were vested in the Governor in Council; sections 13 & 14 relate to penalties for breaches of duty, &c.; section 19 empowered the Governor to remit duties, forfeitures, &c.; section 20 relates to the same subject.

The two last clauses seem intended among other things to authorize the executive government to remit forfeitures when great hardship or injustice to individuals would otherwise be incurred.

The 10 & 11 Vic. c. 31, secs. 5 & 38, applied the 8 Vic. c. 4 to that act; section 9 relates to forfeiture of goods illegally imported; section 45 relates to the removal of goods seized without the permission of the seizing officer or other competent authority; section 48 enacted that goods seized as forfeited should be deemed and taken to be condemned, &c., unless notice of claim be given as therein provided within one calendar month from the day of seizure (sec. 58, at the end) and that it should be lawful for any judge having jurisdiction to try and determine such seizure, and with the consent of the collector, &c., to order the delivery thereof to the owner, on receiving security by bond with two sufficient sureties, to be approved of by such collector, &c., which bond should be taken to her Majesty's use in the collector's name, and should be delivered to and kept by him; and in case such seized goods should be condemned, the value thereof should be forthwith paid to the collector, otherwise the penalties should be enforced and recovered. Sections 51, 52 and 53 relate to the courts in which penalties and forfeitures may be recovered; section 52 at the end reserves the powers vested in the Governor with regard to the remission of penalties or forfeitures; section 55 authorizes the collector to deliver up perishable goods on receiving security. Sections 56 and 57 prescribe the form and mode of claiming goods seized, &c. Section 71 imposes penalties on officers of customs collusively seizing, delivering up, or making any agreement to deliver up, &c. Section 72 empowered the Governor in Council

to make regulations (among other things) for any purpose for which by that or any act, &c., or by law, he was empowered to make orders or regulations, such regulations being general or special, and to authorize the taking of such bonds and security as he might deem advisable for the performance of any condition in which any remission or part remission of duty, indulgence, or permission should be granted to any party, or of any other condition made with such party in any matter relating to the customs or trade; which bonds, and all bonds taken with the sanction of the Governor in Council, expressed either by general regulation only or by special order, should be valid in law, and upon breach of any of the conditions thereof might be enforced, &c. Section 73 relates to the same subject.

By section 75, that all bonds and securities authorised under that or any other act should be taken by the collector to and for the use of her Majesty, &c., and should be so taken before the delivery of any goods, &c.; and all such bonds should be as nearly as practicable uniform, and printed or lithographed forms thereof kept in each office of customs, &c.; and by section 76, blank forms of all necessary papers should be printed uniformly and supplied by the proper officer, &c. See also the interpretation clause at the end.

Subsequent acts (12 Vic. c. 1, sec. 29, &c.) do not seem to affect the foregoing provisions.

Reference may be made to the following authorities as bearing upon the validity of bonds, &c. which are against the policy of the law or not in strict conformity with its provisions: *Ballard v. Pop* (3 U. C. Q. B. R. 317), *Webb v. Brooke* (3 Taunt. 6), *Shipley v. Kymer* (1 M. & S. 493), *Newman v. Newman* (4 M. & S. 66), *Collins v. Gwynne* (7 Bing. 423, S. C. 9 Bing. 544), *Wetherell v. Jones* (3 B. & Ad. 221), *Gwynne v. Burnell* (6 Bing. N. S. 453, and cases there cited).

I perceive no sufficient reason for holding the bond void on the face of it; it is taken for and on behalf of the Queen, and no prescribed forms of bonds are given by the statutes. For all that appears, either on the face of the bond or the plea, the first obligor, Macklem, may have duly claimed the

goods, and they may have been restored to him by order of a judge, or under some general or special regulation of the Governor in Council.

The existing as well as former acts seem designed to confer a wide discretion upon the Governor in Council in relation to such matters, and to leave it to his discretion to enforce forfeitures absolutely, or to relieve against them on terms deemed reasonable and just, or to direct regular judicial proceedings for the condemnation of goods seized as forfeited, to be pursued.

The present bond is obviously intended to abate the decision of the Governor in Council, and it is not shewn the result was favorable to the defendants or against the seizure; the special authority and inducement under which the bond was taken and the goods delivered up might have been recited in the condition; but not being done, it does not follow that the non-existence of authority or the illegality of the inducement are to be presumed; and if not, they are not shewn by way of defence. As to the alleged abandonment of the seizure, of course it was to be abandoned in the nature of the transaction, so far as the collector's relinquishment of his hold upon the goods went; but there is nothing to shew an abandonment of proceedings for their condemnation, but the contrary. The plea does not allege a collusive agreement for the delivery up of the goods, or that it was intended to suppress the seizure, or that it was suppressed; and any such covert understanding would be quite inconsistent with the very terms of the condition on the face of it.

It appears to me therefore that judgment should be given for the demurrer.

McLEAN, J., and RICHARDS, J., concurred.

THOMAS JACKSON V. ARTHUR JOHN ROBERTSON.

Married women.—Certificates of justices.

A certificate under the provincial statute 2 Geo. IV. chap. 14, signed by the chairman and countersigned by the clerk of the peace, and endorsed on a deed, that on &c., personally appeared C. B., *within named*, and being personally examined in the presence of &c., justices of the peace, &c., touching her consent *thereto*, and did appear to this court to *give the same* freely and voluntarily without any coercion on the part of her husband or any other person.

Held, that such certificate, though deficient in form, was good in substance.

Ejectment for the east parts of Nos. 9 & 10, &c., Harwich.

On the trial it was proved that Wm. Parke, the former owner of these lands, died in 1810 or 1811, having first made a will devising them in the residuary clause to his wife for life, and afterwards to Mary Anne Patterson and Claire Gouin Beaubien, wife of Jean Marie Beaubien, and their heirs and assigns, equally to be divided between them, share and share alike, being part of the residue: the testator died in 1810 or 1811, and his wife died in or about 1815, long before the deed of 1831 hereafter mentioned. The defendant is husband of Mary Anne Patterson, who died leaving issue.

By indenture of bargain and sale, executed in Upper Canada, and dated the 12th April, 1831, Beaubien and wife jointly conveyed to John Jackson lots Nos. 9, 10, &c., Harwich, 400 acres, more or less, in fee, registered 30th of January 1832. Endorsed thereon is a certificate as follows: "Western District, at a general quarter sessions of the peace for the said Western District, held at Sandwich, in the county of Essex, on the 12th July, 1831, personally appeared Claire Bobien, *within named*, and being personally examined in the presence of Charles Elliott, George Jacob, William Berczy, and John B. Baby, of the justices of the peace in and for the said district, *touching her consent thereto*, and did appear *to this court* to give the *same* freely and voluntarily without any coercion on the part of her husband or any other person. Signed Charles Elliott, chairman Quarter Sessions, Charles Aitken, clerk of the peace, Western District."

By indenture of bargain and sale, dated 30th April, 1838, John Jackson and wife conveyed to plaintiff part of lots

No. 9, or east end of said lot, containing fifty acres, and also the rear part of No. 10, or the east end of said lot, containing fifty acres; registered 2nd June, 1851.

Defendant objected. Plaintiff's case failed: first, because the deed of 12th April 1831 was not duly certified; and second, because an actual ouster was not proved. On the first point leave to move a nonsuit was reserved, the second was seemingly embodied into a reference to the prov. stat. 14 & 15 Vic. ch. 114, sec. 10; but the defendant did not prove the necessary notice of disclaimer to bring himself within its provisions. The rule nisi is to set aside the verdict and enter a nonsuit on leave reserved, on the ground that there was not a legal certificate on the indenture made between Jean Marie Beaubien and Claire his wife and John Jackson, shewing that the said Claire parted with her real estate in the said indenture mentioned.

On the argument, *A. Prince*, for the plaintiff, contended that the certificate would have been sufficient if it had only said the wife had been examined, and there is no form given under the old act.

J. Wilson, for defendant, that the certificate should have stated that the married woman had been examined touching her consent to alien and depart with her estate, and that she did so freely and willingly, and without coercion or fear of coercion.

MACAULAY, C. J.—This is a novel question, and by no means a clear point. It will be observed that the provincial statutes providing for the parting with their real estates by married women was designed to supply the want of means to dispense with levying fines, &c., and the separate examinations and acknowledgments are analogous to the proceedings and practice in relation to fines and recoveries.—2 Sellen's Pr. Fines; 5 Cruise's Dig., 1st Ed. 124, 132; 3 Atk. 702. It will be perceived that our statutes render an examination and acknowledgment before a competent tribunal or authority indispensable and conditional to the validity of the deed, while the clauses respecting the

certificate thereof are in terms directory only. It may therefore be, perhaps, correctly held, that though the confirmation of the deed by examination and acknowledgment is conditional, and a condition precedent to the passing of the estate, that the certificate thereof is directed to be indorsed as evidence ; and to facilitate the proof thereof it has been, I believe, generally supposed an essential act to complete the transfer, and has always been received as proof of the fact of examination, &c., though not expressly made evidence by the statutes, like the certificate of the registrar, endorsed by county registrars.

Regarding it, however, as not conditional, and only directed and intended in order to constitute evidence in the nature of the record, that the examination was had in strict conformity with the terms of the statute, I am (though by no means free from doubt) disposed to consider the present certificate good in substance though defective in form. In the first place the deed purports to be executed by the husband and wife as their joint act, and it was proved as a fact to be a conveyance of her real estate. Then the certificate certifies that at a period three months after the date and apparent execution of the deed at the general quarter sessions of the peace held at Sandwich, in the county of Essex, in which the land was situated, personally appeared Claire Beaubien, within named, and being personally examined, &c. Now the words within named are intended to designate and identify Claire Beaubien who appeared in court as the wife of Beaubien ; by reference to the deed within, they in effect state that the within named Claire Beaubien personally appeared : the reference to the *within* directs attention to the deed, which must be opened and looked at, to see who it was that so personally appeared. We may suppose, the deed being so opened, that the woman therein named was personally examined in the presence of the chairman and other justices, sufficient to form a quorum of the Court of Quarter Sessions, touching her consent thereto ; in other words, touching her consent to such deed, for the word thereto refers to the deed or the within instrument ; and that she did appear to the court *to give the same*. Same

what? It may be said the same deed or instrument; but rather, I think, the same consent thereto—that is, did consent to such deed or instrument. It adds “freely and voluntarily, without any coercion on the part of her husband or any other person.” This shews that she was consenting to the within deed or instrument, (the purport and object of which was to alien and depart with her real estate therein mentioned, though not so expressed in the certificate)—that is, to a deed of, or conveying her real estate therein described freely and voluntarily, without any coercion; which seems comprehensive enough to embrace fear of coercion, else it could not be free and voluntary without any coercion. This certificate is then formally signed by the chairman and countersigned by the clerk of the peace. As evidence then, can there be any doubt of the fact that she was duly examined and did freely acknowledge the deed, and consent to part with her estate therein mentioned; I think not, and from what does appear, presuming that all was rightly done that ought to have been done, and that in consenting “thereto” she did consent to alien and depart with her real estate as therein mentioned, and nothing appearing to the contrary, after a lapse of twenty-three years, except the informal nature of the certificate under which the grantee has, seemingly, ever since held, I am disposed to uphold the deed, rather than consider it null and inoperative against what appears so satisfactorily to be the truth and justice of the case.

Whether the grantee ever entered into the actual possession under this deed, and if so, when, was not shewn. No objection to the plaintiff’s recovery was made on the ground that the right of entry which accrued upon the execution of the deed had never been exercised, and had become lost by the lapse of twenty years and upwards. And assuming therefore that the Statute of Limitations does not interfere, I do not think that either the statute 4 Wm. IV, chap. 1, sec. 24, or the 14 & 15 Vic. chap. 114, sec. 10, precludes the plaintiff’s recovery; and although no notice seems to have been given, as might have been done under the 4 Wm. IV, chap. 1. sec. 52, it appears to me

that if the certificate is defective and of itself insufficient to support the action, this is just one of the cases to which that clause of the act was intended to apply, and that if driven to that necessity the plaintiff by taking proper steps might, perhaps, have relied thereupon. Beaubien and wife may be still living; and if so, the case of 11 Q. B. 917, S. C. 12 Ju. 556, applies, except so far as our statutes override it. See also 5 U. C. Q. B. R. 167.

The examination and certificate are the acts of the court, and so far as a certificate is necessary to identify the deed, the present one seems quite sufficient for that purpose.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

HARTLEY V. HUNTLEY.

Award.

Where a plaintiff proves such an award as he states in his declaration, its legal effect or validity is not involved under the plea of *nul tiel award*.

DEBT on an award made under a submission by mutual bonds contained in one instrument.

The declaration, after stating the bond, dated 8th of July 1853, &c., states the condition to have been that plaintiff and defendant should abide the award of Elridge and Chapman, two arbitrators &c., indifferently named, &c., to arbitrate &c., of and concerning the surrendering to the defendant by the plaintiff of a lease of a saw mill, situate on lot No. 10, 4th concession North Gwillimbury, for the residue of the unexpired term which plaintiff had therein; and also of and concerning sundry sums of money and accounts then in difference between the plaintiff and defendant; and also of and concerning the condition of two bonds held by the plaintiff and defendant; so as said award be of and concerning the matters so referred, should be made in writing, under the hands of each of the said arbitrators, ready &c., within a month from the date of the bond.

The plaintiff alleges that an award was duly made on the 16th day of July 1853, of and concerning the matters in difference, &c., which among other things directed that the defendant should, on the 16th day of August then next, at a place named, and within certain named hours, pay or cause to be paid to plaintiff twenty-five pounds, in full for his damages and costs of and occasioned by the said reference, and that upon payment thereof the parties should execute mutual releases, &c. Breach—non-payment of the twenty-five pounds.

2d Count.—Fifty pounds upon an account stated.

Pleas.—1st to 1st count—*Non est factum.*

2d to 1st count—That the said arbitrators did not make the said supposed award of and concerning &c., *modo et forma*, &c., and issue.

3d to 2d count—Never indebted, and issue.

At the trial plaintiff produced a bond in the penal sum of £100, dated 8th of July 1853, from each party to the other respectively. Condition (after reciting that defendant leased to plaintiff a saw-mill, situate on lot number ten, in the fourth concession of North Gwillimbury, for four years, but then unexpired, and defendant wishing plaintiff to give up the remainder of the term unexpired, it was agreed to leave the value to be deducted and paid to the said plaintiff for such assignment of the term to the decision of two indifferent persons, &c., and in case of dispute, to an umpire &c.; and that sundry other differences had arisen between the said parties, as to sundry sums of money and accounts then in difference between them, and also as to the condition of two bonds held by both of the said parties, it had been agreed to leave the same to the said arbitrators, in a similar way to the said assignment of the term, and that defendant had chosen Elridge, and plaintiff Chapman). The condition was, “that if plaintiff and defendant should well and truly stand to, observe, perform and fulfil their award, to be made in writing, within one month from date, in and concerning the abovementioned surrender of the term of the said lease, and in and concerning the above mentioned sums of money and accounts,

and matters in difference, and also as to the conditions of the said two bonds &c., claims and demands whatsoever concerning the same," and if not, then to abide the award of an umpire, &c. Then &c., and that the submission may be made a rule of the court of Queen's Bench.

Also an award in writing dated 16th of July 1853, and signed by the two arbitrators above named, whereby, after reciting the aforesaid bond of submission &c., they awarded that the plaintiff in building the saw-mill for defendant had (with slight exceptions for which they had allowed) built the same according to the said bond; and, taking into consideration the giving up possession of the said saw-mill and other property by said plaintiff to defendant at his request six months before he was entitled to the same, and all other matters and accounts in dispute between them, that said defendant should, on the 15th day of August then next, between the hours &c., pay or cause to be paid to said plaintiff twenty-five pounds in full for *his damages and costs of and occasioned by the said reference*, and (after another provision not material to be here stated) that upon payment thereof the said parties respectively should execute mutual releases, &c.

A verdict was found for the plaintiff, with leave to the defendant to move to set it aside or to arrest judgment.

During this term *Wilson*, Q. C., for defendant, obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, or why judgment should not be arrested.

Bell shewed cause during the same term, and contended that the word damages in the award was equivalent to *value*, and that in point of fact the value only was decided. That to take advantage of the omission relied upon it should have been specially pleaded, instead of pleading no award. —*Aitcheson v. Cargey*, 2 D. & R. 192, S. C. 2 Bing., 199; *Young v. Miller*, 3 B. & C. 407; *Adcock v. Wood*, 6 Ex. R. 814.

Wilson, in reply, contended that the plea of no award means no valid award.—*Dresser v. Stansfield*, 14 M. & W. 822; *Adcock v. Wood*, 6 Ex. R. 814; *Armitage v. Coates*, 4 Ex. 644.

That the value only was submitted, and therefore the arbitrators must find value specifically. That the costs of the reference were not submitted; and if not, the *one* sum vitiates the award.—Clapcott v. Davy, 1 Lord Ray 611; and that if the surrender is submitted it is not disposed of.

MACAULAY, C. J.—The second plea seems to require proof of a valid award.—Dresser v. Stansfield (14 M. & W. 822), Armitage v. Coates (4 Ex. R. 644), Adcock v. Wood (6 Ex. R. 614), Clapcott v. Davy (1 Lord R. 611), Morgan v. Smith (9 M. & W. 427). I do not think it was submitted to the arbitrators whether the plaintiff should surrender the residue of his term or not; that was already agreed upon, and the only matter submitted was the value to be allowed therefor. As to such value, I think it is determined upon. Certain differences in addition thereto were submitted, and the result of the whole is twenty-five pounds to the plaintiff, for his damages and costs of and occasioned by the said reference; the award recites the submission, shewing the object of the reference. That the twenty-five pounds is in consideration of the surrender of the term is clear, from the language of the award preceding it. It is true the arbitrators call it *damages* instead of *value*; but the term damages is probably used as being the result of all matters submitted pro and con, and I think it includes the value as one item included in and covered thereby.—Round v. Hatton (10 M. & W. 660).

As to the mention of the saw-mill and other property shewing an excess of authority: it is not to be intended unless it clearly appears, and no property not comprehended in the terms of the submission respecting the surrender of the lease of the saw-mill is alleged or proved to have been included in the award. The lease may have included furniture belonging to the mill; and certain utensils used in working such a mill, as fixtures, may very well have passed under the surrender, and constituted the *property* referred to.

The only doubt arises from the addition of “costs of and occasioned by the said reference,” as included in the twenty-five pounds. But no objection was urged on this head,

and it is said the plea of no such award means no valid award, or no valid award such as the declaration states.—*Dresser v. Stansfield* (13 M. & W. 822), *Kepp v. Wiggett*, (6 C. B. 280). But the case of *Adcock v. Wood* (6 Ex. R. 814) seems to shew that when the plaintiff proves such an award as he states, its legal effect or validity is not involved. Now here, in my view of it, the plaintiff did prove such an award as he states.

The objection is on the record, and the case is reduced to that part of the rule which seeks to arrest judgment. This part of the rule was rested upon the same objections on the ground that, as stated, the award was void on the face of the pleadings.

It was contended the declaration stated a submission of and concerning the surrendering the lease of a saw-mill, and yet nothing was decided respecting the saw-mill, nor any notice taken of it in the award. But I think the award of twenty-five pounds for damages, &c., of and occasioned by the said reference, may fairly be construed to mean his damages of and concerning, or occasioned by the subject matter of the reference—in other words (among other things), of and concerning the surrender of the saw-mill.

It does not seem necessarily to require an award directing a surrender, and the terms thereof; the submission was of and concerning the surrendering &c., but in what difference or matters submitted, the declaration does not disclose, nor does the award import that it was whether the mill should be surrendered or not. It may have been something concerning it—*Simmonds v. Swaine* (1 Taunt. 549), is much in point, also *Thirkell v. Strachan* (4. U. C. Q. B. R. 136). It was not made a ground, or contended at the argument that the arbitrators could not include the costs of the reference in their award; and the twenty-five pounds is expressed to be for the plaintiff's damages and his costs of and occasioned by the reference—damages relating to the premises submitted and awarded upon, and the costs of and occasioned by the reference. I do not wish to be understood

as holding that the costs of the reference were in the power of the arbitrators under this submission. (*See note.*)

McLEAN, J. and RICHARDS, J. concurred.

THE NELSON AND NASSAGAWEYA ROAD COMPANY V. PHILO
D. BATES.

Venue.

A declaration laying the venue in the United Counties of &c., is bad on special demurrer.

Writ issued 7th of March—Declaration, 22nd of March, 1854.

Declaration, in debt for £45, laying the venue in the United Counties of Wentworth and Halton. First count states that defendant is the holder of fifty shares in said company, and is indebted to said company in £25, in respect of five calls of five pounds each upon each of the said shares, whereby an action hath accrued to said company, under the statute 16 Vic., to demand the said sum of £25, parcel &c. Second count—for that defendant, to wit, on &c., was indebted to said company in £20 for interest upon and for the forbearance of said company to defendant at his request, of money due and owing from defendant to said company on divers accounts then stated between them, whereby and by reason of the non-payment thereof an action hath accrued, &c.

Demurrer to the declaration, on the ground that no sufficient venue is laid in the margin thereof, the same being laid in the United Counties of Wentworth and Halton, instead of in one of the said counties by venue.

NOTE.—When the opinion of the court was expressed in this case, Mr. A. Wilson, Q. C., for defendant, said he had not objected that the arbitrators had no authority to award costs of the reference, but that they should not have included them in one sum, with the value, &c., which formed the subject of the said reference, if properly included in the word damages; but that they ought to have distinguished between, and specified two separate sums.

MACAULAY, C. J.—I think damages included value, &c., in common with all things submitted, and that if empowered to award costs of the reference, I do not think the value, or damages and costs, being both or all included in one sum, vitiated the award. It was the result in the aggregate of all left to them, and was final, nothing being left undetermined or in uncertainty.

To first count—That it is not alleged that the cause of action therein set forth arose or accrued to the plaintiff before the commencement of this suit, nor that defendant was the holder of said shares or indebted to plaintiffs at the time of the commencement of suit. That it is not alleged on what day, or at what time defendant was indebted as therein is alleged, or when the cause of action accrued, or that defendant was requested to pay the sum of money therein mentioned.

The demurrer was argued during the present Easter term.

MACAULAY, C. J.—The statute 12 Vic., ch. 78, sec. 7, enacts that in laying the venue in any judicial proceeding in which the same may be necessary, in any county which may be so united to any other county or counties, as hereinbefore provided, the same shall be laid in such county by name, describing it as one of the united counties of—and——(naming them); and for the trial of any issue, or for the assessment of damages in the course of any such judicial proceedings, when such issue shall be tried, or such damages assessed by a jury, the jury shall be summoned from the body of the united counties, as if the same were one county.

This seems explicit enough, and shews the present venue to be informally laid, though probably quite sufficient after verdict, or judgment by *nil dicit*; the alteration of the law in olden times, under which the jury came from the body of the county, instead of the ville, does not appear to have been considered sufficient to dispense with a ville or place certain within the county in the body of the declaration, however the venue in the margin would aid and be sufficient after verdict or judgment; and I do not see that we can, in the face of the terms of the statute, hold a venue of the United counties sufficient in form, because the jury are to come from both, when the same act says the venue shall be laid in the county by name, which may be united to other counties. The statute seems to me to so provide in all cases, when it shall in the nature of the proceeding be necessary to lay a venue; and the court of Queen's

Bench has not, that I can ascertain, held a joint venue sufficient on special demurrer, as was supposed at the argument.

McLEAN, J., and RICHARDS, J., concurred.

Judgment for the demurrer.

CRABB QUI TAM V. LONGWORTH.

Justice—Notice.

In an action for a penalty against a defendant for acting as a justice of the peace without qualification, &c., the defendant is not entitled to notice of action.

Debt for £20 penalty, for acting as a justice of the peace in the United Counties of Huron and Bruce, without qualification, contrary to the statute.

The case was tried before Draper, J., at the last assizes for the United Counties of Huron and Bruce, when a verdict was found for the plaintiff, with leave to the defendant to move a nonsuit.

Cooper, for defendant, obtained a rule on plaintiff to shew cause why a nonsuit should not be entered.

MACAULAY, C. J.—The only question raised is, whether the defendant was entitled to a month's previous notice of action under the prov. stat. 16 Vic. c. 180 and 14 & 15 Vic., ch. 54, which had not been given. Reference was made to the I. S. 18 Geo. II. ch. 20, and the 24 Geo. II. ch. 44, and also to the provincial statutes 6 Vic. c. 3, 14 & 15 Vic. c. 54, and 16 Vic. c. 180.

The 14 & 15 Vic. c. 54, sec. 2, enacts that no writ shall be sued out against any justice of the peace or other officer or person, fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the common law, or is imposed by act of parliament, either imperial or provincial, &c., unless notice in writing of such intended writ &c., shall have been served, &c., one calendar month before suing out such writ, &c.—See *Wright v. Horton* (Holt 458), *Charlesworth v. Bridged* (1 C. M. & R. 498, 505, S. C. 4 Tyr. 825, S. C. 1, C. M. & R. 896; 2 Saunder's Plg. and Ev. 265); *Woodward v. Watts* (17 Ju. 790, S. C. 21 L. J. 149.)

Having referred to the cases and compared the words of the English statutes with our own, we do not see any satisfactory ground for discriminating between them, or for holding the defendant entitled to notice of action, as contended for at the trial, and therefore think the rule must be discharged.

McLEAN, J. and RICHARDS, J., concurred.

REES v. HOWCUTT.

Declaration stated that in consideration that plaintiff at defendant's request, had sold to defendant a certain portion of plaintiff's lot, defendant then promised the plaintiff to allow him a passage or communication from the rear of plaintiff's lot to Brock street, through the defendant's lot, whenever such lane or means of communication should be laid out or required by plaintiff.

Held bad on general demurrer, for that the executed consideration, though laid with a request, would not support the promise alleged.

Writ issued 28th of March, 1854.—Declaration, 13th of April, 1854.

Declaration in assumpsit states that before and at the time of the making of the defendant's promise, plaintiff owned a certain lot of land fronting on King street, in Toronto, adjoining to and lying west of another lot belonging to the defendant, and fronting on Brock street in Toronto aforesaid, and thereupon heretofore, to wit, on &c., in consideration that the plaintiff at the defendant's request, had sold to the defendant a certain portion, to wit, twenty-five feet off the rear of his the plaintiff's said lot, the defendant then promised the plaintiff to allow him a passage or communication from the rear of the plaintiff's said lot to Brock street aforesaid, through the said lot of him the defendant, whenever such lane or means of communication should be laid out or required by plaintiff. Plaintiff then avers that said lane was to be of reasonable width for the passage of carts and carriages through, to wit, seventeen feet wide; and that he did afterwards, to wit, on &c., require from defendant permission to lay out a lane or communication, according to defendant's agreement, from the rear of the plaintiff's said lot to Brock street aforesaid, through the said lot of the defendant, or that the

defendant would lay or cause to be laid out the same. But that defendant did not nor would give plaintiff permission to lay out such lane or any lane, but to do so refused ; nor did he, nor would he lay out such lane or any lane, according to his said agreement, nor has he since done so ; but on the contrary, plaintiff avers that defendant, disregarding his said promise in that behalf, afterwards, to wit, on the day and year aforesaid, absolutely sold and conveyed the said lot of land through which he had agreed that plaintiff should have such lane or communication whenever he might require the same to a certain person, to wit, &c., the Hon. John Hillyard Cameron, without notice to the said John Hillyard Cameron of any such agreement respecting the same as aforesaid ; and plaintiff further avers that the said John Hillyard Cameron was afterwards, to wit, on &c., requested by plaintiff to lay out such lane through the said lot, but the said John Hillyard Cameron refused so to do, nor has he since done or permitted the same to be done, nor will he lay out the same, and plaintiff cannot now procure the same to be laid out according to the said agreement ; in consequence whereof the plaintiff's said lot of land has been greatly deteriorated in value ; and in order to get the readiest access to the rear of the said lot (which is a large lot capable of being divided into several building lots, &c., fronting on King street, in the said city) a lane must be made from the front part of said lot on King street, and a large portion of the frontage, to wit, &c., of great value of, to wit, &c., which plaintiff could otherwise have sold for that sum. Wherefore plaintiff saith that his said lot being so deteriorated in value as aforesaid plaintiff could not sell the same for the price he could otherwise, and if said lane had been laid out by defendant, have got for the same ; and afterwards, and after defendant had been required to open said lane after the said sale to him, the said John Hillyard Cameron, to wit, on the day and year aforesaid, plaintiff sold said lot to one Joseph D. Ridout, for a much less price, on account of the depreciation in the value thereof, than he could otherwise have done, to wit, for &c., to plaintiff's damage, &c.

Fifth plea.—That at the time of the making of the said agreement and promise in the declaration mentioned, it was also agreed by and between plaintiff and defendant, that if plaintiff did not lay out his said lot of land in building lots, that the said agreement and promise should be considered as rescinded and of no effect, and the defendant says that plaintiff did not at any time lay out his said lot of land in building lots; but on the contrary thereof, sold and disposed of the same in one parcel to Joseph D. Ridout, in declaration mentioned, before the sale by defendant to the said John Hillyard Cameron. Verification.

Seventh plea.—That defendant did not promise as in the declaration mentioned, at any time within six years before the commencement of this suit; concluding with a verification.

Demurrer, to fifth plea, on the ground that it is an argumentative denial of the contract alleged, and amounts to the general issue.

To seventh plea.—That it traverses matter not alleged in the declaration; that is to say, that it sets up that defendant did not promise within six years before suit; whereas it is not alleged in the declaration that defendant did promise within six years; that it is no answer to the allegation that the lane was to be opened up when plaintiff might require defendant to do so, or suffer it to be done at any time after the making of the agreement, and that he was only required, to wit, on &c., less than six years before suit. Notice was given of exceptions to the declaration, on the grounds that there is no sufficient consideration for the promise alleged, stated in the declaration; that the right of way demanded over the defendant's land is not stated to have been agreed for for any specific time, nor is it shewn for what period of time it was required or demanded by the plaintiff; that no action can be maintained for such right upon a parol agreement; that it is not alleged that a lane was ever laid out by the plaintiff and that the demand made by plaintiff was of a larger character than the promise of defendant authorised him to make; and the

breach of agreement alleged is more extensive than the promise of the defendant, and that no proper breach is stated in the declaration.

The demurrer was argued during this term by *Vankoughnet*, Q. C., for plaintiff, and *Hon. J. H. Cameron*, Q. C., for defendant.

MACAULAY, C. J.—The pleas demurred to having been given up on the argument, the plaintiff is entitled to judgment on demurrer thereto.

As to the declaration, I think it bad on two grounds. First,—because the only consideration stated for the defendant's contract is a past or executed one, and therefore insufficient, as the following cases shew—*Roscorla v. Thomas* (3 Q. B. 234,) *Hopkins v. Logan* (5 M. & W.), *Belcher v. Cook* (4 U. C. Q. B. R. 41, 5 lb. 163), *Eastwood v. Kenyon* (11 A. & E. 448), *Petch v. Lyon* (9 Q. B. 147), *Cocking v. Ward* (1 C. B. 870).

Second—Not only because the breach assigned (not laying out or allowing the plaintiff to lay out the lane claimed by plaintiff through defendant's lot) was not a breach of the contract stated, (not to allow the plaintiff a passage or communication from &c. to &c., through defendant's lot, whenever such lane or means of communication should be laid out or required by the plaintiff); but because the interest claimed by the plaintiff is an easement in *alieno solo*, not alleged to have been created by deed or grant, and therefore being only a license at the utmost, revocable at pleasure and revoked by the alleged transfer of the land to another without notice, and it may be assumed without reserving such right of way to the plaintiff.—*Wallis v. Harrison* (4 M. & W. 539), *Wood v. Leaditter* (13 M. & W. 858, 15 Q. B. 284, 16 Ju. 84, 8 Eng. 305.)

Without regard to the other objections, I think judgment must be for the defendant as on general demurrer to the declaration.

McLEAN, J. and RICHARD, J. concurred.

REGINA V. VAN AERMAN.

A prisoner charged with forgery in Canada, having been arrested in, and surrendered by the government of, the United States, under the Ashburton Treaty, upon application for bail, on the ground that there was no evidence of the *corpus delicto*: Held, that the surrender of the prisoner by the United States Government was sufficient evidence.

This is an application to admit the prisoner to bail upon the charge of forgery, for which he is at present committed to the gaol at Brantford. The circumstances represented are, that in the autumn of 1853 the prisoner obtained from the Montreal Bank at Brantford the sum of £1,250, or \$5000, upon a bill or draft in the following words:—

“\$5000.

“HAMILTON EXCHANGE BANK,

“Hamilton, Madison County, N. Y. }

“October 1st, 1853. }

“Pay to the order of D. W. Van Aerman, Esq., Five Thousand Dollars.

(Signed)

“JOHN W. ABELL, Cashier.

“To S. K. Stow, Esq., Cashier, Troy City Bank.

“Troy, N. Y.

Endorsed

“D. W. VAN AERMAN.”

Which bill the prisoner (who is the payee mentioned therein) represented to be genuine, although in fact, as he well knew, it was a printed blank of the Hamilton Bank, which had been surreptitiously obtained and filled up fraudulently in the State of New York, and signed by John W. Abell in his own proper person, who was not nor ever had been cashier, the capacity he assumed in signing this false instrument.

The prisoner is a citizen of the United States, and was transiently in Upper Canada, not having been a fixed resident herein, and before the discovery of the fraud had returned or fled to the United States; and was, in April last, surrendered by the Government of the United States, under the treaty of the 22nd of August, 1843, called the Ashburton Treaty, upon the requisition of the government of Canada, made under the great seal, charged with forgery.

Upon his being brought to Brantford, an examination took place before the convicting magistrate, who had also taken the depositions in the first instance, upon which the

application was made for the prisoner's surrender; the great seal instrument directed the person authorised to demand him to deliver him over to the sheriff of the county of Brant, &c., which he did; and after the further examination had, he was committed to gaol under the justice's warrant, charged with forgery.

The application for bail is rested on two grounds :

First—That there is no sufficient proof of the *corpus delicti*, or of the instrument being false and fabricated, it being principally hearsay.

Second—That the instrument, though unauthorised, is not a forgery, and the offence of the prisoner at the utmost, a misdemeanor only—namely, obtaining money under false pretences.

On the argument during this term, *Skelton*, for the prisoner, referred to *Rex v. Webb* 3 B. & B. 228; S. C., B. & R. 405; 2 East P. C. 963; 2 Leach 775.

Dr. Connor, Q. C., *pro Regina*, submitted that the application for bail did not call for express adjudication as to the legal nature of the offence, nor did it depend upon technical objections to the evidence, nor even upon the force of the evidence, but upon the consideration whether there appeared reasonable grounds for the charge—reason to apprehend that the party, if bailed, would not appear, the enormity of the offence charged, the punishment, and the evidence that probably may, and may be reasonably supposed will, be adduced in support of the charge when the assizes take place,—1 Ellis 1; *Law Times*, 13th of May, 1854; 6 *Evan's Stats.* p. 90; P. S. 10 & 11 Vic. ch. 9, sec. 12 & 13; *Reg. v. Snelling*, 17 Ju. 1012.

He relied also on the evidence affording strong presumptive proof of the *corpus delicti* to a material extent, by the prisoner's own admissions; he also noticed the prisoner's deposition, denying that he had uttered a forged bill, knowing it to be forged, but not denying knowledge of its falsity, and seemingly relying upon the distinction contended for by his counsel between forgery and obtaining money under false pretences.

MACAULAY, C. J.—The application for bail in this case was originally made before Mr. Justice *Burns* in chambers, and renewed before me in chambers, but not being prepared to grant it, I thought it better to leave it open to the prisoner to apply to the court in term, without any decisive opinion expressed by me; and the application was renewed during this term before this court.

The Ashburton Treaty was confirmed by the Imperial statute 6 & 7 Vic., ch. 76, and the provincial act 12 Vic., ch. 19; both of which render copies of the depositions taken in the United States, upon which an original warrant may have been granted, admissible as evidence, &c.

Now, here we have in the first place the deposition of the agent of the Montreal Bank, expressly charging the prisoner with forgery, followed by an application for the prisoner's surrender, and his surrender accordingly. Forgery, and the altering of forged papers, is an offence specified in the treaty, and the surrender could only be upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found as would justify his apprehension and commitment for trial, if the crime or offence had been there committed; whether the prisoner sought an asylum or was only found in the United States, may be a question—apparently both. The evidence and proofs on which his surrender was determined are not before us, but it must be taken to have been sufficient to have warranted his commitment in the State of New York, where he was found, and where the false instrument was fabricated.

Upon this application, however, the requirements of the treaty, to justify his surrender, should not be overlooked. The great seal instrument, moreover, demanding his surrender and directing his delivery to the sheriff, until delivered by due course of law, as an act of state, under the treaty, is another material circumstance, when the court is asked to exercise its discretion in granting bail under the statute 4 & 5 Vic., ch. 24, sec. 5. The convicting magistrate has transmitted copies of all the depositions, &c.,

before him ; but not all that it may be reasonably supposed to exist.

It is not necessary to express an opinion on the point, but I am much disposed to regard the instrument as a forged bill of the Hamilton Bank ; and even if the prisoner's offence amounted to false pretences only, I should hesitate to bail him under the circumstances under which he has been taken, surrendered and received into custody.

Being in custody, he is liable to be prosecuted for any offence which the facts may support ; and we must bear this in mind, especially in reference to the Forgery Act 10 & 11 Vic., ch. 9, sec. 13. We must bear in mind also, that the prisoner has not properly forthcoming to meet the charge, and did not voluntarily surrender himself within the reach of our laws, but that he was a fugitive ; and the very fact of flight from such a charge militates against the party,—4 Blk. Com. 378 ; 1 Chitty's Crim. Law 98, 99, 731, 1 Leach 484 ; Rex v. Judd. (2 T. R. 255-7 ; 9 Dow 553).

I think there is, on the whole, sufficient evidence to warrant the detention of the prisoner in custody. That the offence, if established, will be the knowingly altering a forged instrument, and though the evidence, as it appears on the depositions, might be inadmissible in some points, and insufficient on the whole to warrant a conviction, enough appears to require us to decline enlarging him upon bail under existing circumstances.

McLEAN, J., and RICHARDS, J., concurred.

Bail refused.

GEORGE V. SMITH AND LOGAN.

Award.

An award directing that defendants should give to plaintiff a good endorsed negotiable promissory note, is bad.

Writ issued 24th March 1854 ; declaration, 8th April 1854. Covenant to perform an award. The pleas demurred to were abandoned, and the defendants relied upon an objection to the declaration on general demurrer. The

material part of the award, made the 7th of February 1854, is, "that there was due from the defendants to plaintiff £173 18s. 6d., which they (the arbitrators) did thereby order and direct should be paid and satisfied by the said defendants to the said plaintiff by a good endorsed negotiable promissory note, payable in three months from the 16th of February in the year last aforesaid" (1854).

The point is, whether the action is prematurely brought, depending upon the questions—

First—Whether the direction as to a promissory note is void, as requiring an indorser, not a party nor named.

Second—If so, whether the money became payable upon the execution of the award, or not until the 16th of February 1854.

Third—Or if the direction as to the note be not void on the ground that the defendants together might deliver a good endorsed negotiable note, whether the award is not broken by their omission to do so, and so the amount awarded recoverable as damages.

The demurrer was argued during this present term, when *Wilson*, Q. C., for defendants, abandoned the pleas, and contended that the declaration was bad—the award being void in directing the delivery of a good endorsed negotiable promissory note payable in three months, or a payment in money. That that part of the award directing the payment of the money in three months is good; but in that case the three months had not expired before the commencement of this action. He referred to the following cases as shewing the awarding an endorsed note bad: *Brown v. Watts*, 6 Bing. N. C. 118; *Tipping v. Smith*, 2 Stra. 1024; *Thinne v. Rigby*, Cro. James, 315; *Lee v. Elkins*, 12 Mod. 585; *Samon's Case*, 5 Coke 77; *Booth v. Garnett*, 2 Stra. 1082; *Cooke v. Horwood*, 2 Saund. 337.

M. C. Cameron for plaintiff, in support of the declaration, contended that as there are two defendants, the one making the note and the other endorsing, it would comply with the award—4 Carth; *Simmons v. Swaine*, 1 Taunt. 548;—or that all about the giving the note may be struck out, and the money be payable immediately and the award good.

MACAULAY, C. J.—Upon reference to the cases of Duport v. Wildgoose (2 Bul. 260), Tipping v. Smith (2 Stra. 1024), Booth v. Garnett (2 Stra. 1082), Thinne v. Rigby (Cro. James 315), Lee v. Elkins (12 Mod. 585), Samon's case (5 Coke 77), Cooke v. Whorwood (2 Saund. 337), Simmons v. Swaine (1 Taunt. 548), Therkell v. Strachan (4 U. C. Q. B. R. 136), Wright v. Weed (6 U. C. Q. B. R. 144), Fisher v. Ferris (ib. 534), Wharton v. King (2 B. & Ad. 528), Thursby v. Halbart (1 Show. 82), I think that the legal effect of the award is, that the defendants should give their own note, negotiable with an endorser, or a good negotiable endorsed promissory note, and that it means more than that one shall be maker and the other payee and endorser.

For anything more, as requiring a third party as endorser, it is void; and the breach being for not giving their own promissory note, made by one payable to and endorsed by the other, or made by both payable to the plaintiff or order, but not giving a good negotiable endorsed note, it is bad even if a breach limited to a default by the parties themselves would be sufficient. If so, I think the sum awarded did not become payable until the expiration of three months from the 16th of February 1854, and that the action was brought prematurely.

McLEAN, J., and RICHARDS, J., concurred.

Judgment accordingly.

JAMES PLATT V. ARCHIBALD McFAUL.

Declaration, after stating an agreement for the sale and purchase of from 1000 to 1500 bushels of peas, to be delivered by defendant, at &c., on or before the 15th of November next ensuing the date of said agreement, and that plaintiff should pay for said peas on the 12th of November at the Bank of Upper Canada, in Kingston; averred, that plaintiff on the 12th of November went to the Bank of Upper Canada during banking hours of that day, and was then ready and willing to pay defendant a large sum of money, to-wit, &c., as for the price of 1500 bushels of said peas; but that neither defendant nor any person on his behalf was at said bank at any time during the 12th November to receive the said monies.

Held, that such averment was sufficient on demurrer.

Writ issued 30th January. Declaration, 2nd June 1854, states that heretefore, to-wit, on the 31st October 1853, it was agreed by and between the plaintiff and defendants

that defendant should sell to him the plaintiff, and the plaintiff should purchase from the defendant a certain large quantity of peas, to-wit, from one thousand to fifteen hundred bushels of small peas, in quality of the average crop the county of Prince Edward of the season of the year aforesaid, to be delivered by the defendant at Oswego, in the United States, to Messrs. Fitzhugh & Co., on or before the 15th November next ensuing the date of said agreement, and should also furnish good new bags to carry four or five hundred bushels of said peas, and that plaintiff should pay for the said peas the sum of 3s. 11d. per bushel of 60 lbs. weight in bond, at the Bank of Upper Canada, in Kingston, on Saturday the 12th November then next ensuing the date of said agreement, and should also pay for each of the said bags the sum of one shilling and one penny half-penny; and in consideration of the premises, and that the plaintiff at the request of the defendant, had then promised the defendant to purchase said peas and bags and to pay for the same at the respective rates aforesaid, and in manner and at the times aforesaid, the defendant promised the plaintiff that he would sell the said peas and bags to plaintiff and deliver them in manner and at the times aforesaid; and plaintiff avers that afterwards, to wit, on the 12th day of November aforesaid, he went to the Bank of Upper Canada, at Kingston, during the banking hours of that day, and was ready and willing to pay the defendant a large sum of money, to wit, £500, as and for the price of 1500 bushels of said peas and of the said bags, but that neither the defendant nor any person on his behalf was at the said bank at any time during the said 12th of November, to receive the said monies, and that although the time for the delivery of the said peas and bags hath long since elapsed, and the plaintiff, to wit, on &c., attended at the Bank of Upper Canada aforesaid during banking hours, and was then ready and willing to pay for said peas and bags, &c., and hath always been ready and willing to accept the said peas and bags, &c., and to pay for the same &c., whereof defendant had notice, and although plaintiff requested defendant to deliver to him the said peas and bags on the terms aforesaid, yet, &c.

Demurrer to the declaration, on the grounds: First—That plaintiff alleges as the consideration for defendant's promise that plaintiff should pay for said peas and bags on, &c., at the Bank of Upper Canada aforesaid, yet does not aver that he paid therefor or tendered such payment, nor does he allege that he was in any way prevented by defendant from paying therefor, or any sufficient excuse for his failure to make such payment.

Second—That plaintiff merely avers that he went to the Bank of Upper Canada, &c., during banking hours of the said 12th of November, and was ready and willing to pay to said defendant the price of 1500 bushels of said peas, but that neither defendant nor any person on his behalf was at the bank at any time during the said 12th of November to receive the said monies; whereas the said agreement did not require payment to defendant, or that defendant or any person on his behalf should be at the bank during said banking hours to receive said payment, but that plaintiff should make the said payment at the said bank.

Third—That the quantity of peas to be delivered by the defendant not being fixed in said agreement, but being left undetermined until plaintiff should pay the price thereof, the defendant could not perform his said promise until after the said payment, or notice of the amount of the money which plaintiff was ready, &c., to pay; yet plaintiff neither avers that he paid said price, or that defendant had notice of the amount which he was ready and willing to pay.

The demurrer was argued during this term. *Patterson*, for the demurrer, contended that the Bank of Upper Canada was the place where the money was to be paid, and it was a condition precedent on plaintiff's part that the money should have been deposited, or to allege that he tendered it to the bank. That if the bank was merely a place of appointment, the allegation that plaintiff attended during business hours is not sufficient; that plaintiff should aver that he was there at any hour during the day.—*Lancashire v. Killingworth*, 12 Mod. 530.

Connor, Q.C., against the demurrer, contended that the Bank of Upper Canada was only a place of appointment, and that it was not necessary for the plaintiff to attend before or after business hours.

MACAULAY, C. J.—I think the demurrer should be overruled. It appears to me the nature of the contract has been overlooked. The contract was executory; and not only so, but no property in any peas passed thereby. It had no relation to any specific peas, and the defendant at the time may not have owned or possessed any; but the parties agree that the one would sell and the other would buy, not only no specific peas, but an uncertain quantity, ranging from 1000 to 1500 bushels, to be delivered by defendant to Fitzhugh on or before the 15th of November, 1853, apparently all in bags, as the defendant was to furnish good new bags to carry or hold from 400 to 500 bushels of said peas; then the plaintiff was to pay for the said peas 3s. 9d. per bushel of 60 lbs. weight, in bond at the Bank of Upper Canada, in Kingston, on the 12th November, and should also pay 1s. 1½d. for each of said bags. In the first place; if payment on the 12th of November was a condition precedent to the sale of any peas, I think it was not agreed that the plaintiff might pay it into the bank to the defendant's credit in his absence, but that it was the place appointed at which the plaintiff engaged to pay where he was bound to be with, or to leave funds, and where the defendant was bound to attend to receive payment; and that if the plaintiff attended during the banking hours of that day, it was sufficient, and he was not bound to attend at the outer door after the bank was shut till a later hour: further, that if material that he should have so attended throughout the whole of banking hours or of the banking day, the averment that he went to the Bank of Upper Canada, at Kingston, during the banking hours of that day, and was then and there ready to pay, is a sufficient allegation of the necessary attendance. During banking hours may impart a casual call within the banking hours or a continued attendance throughout such banking hours, and when it is alleged the

defendant did not attend at any time during the 12th of November, the word *during* evidently means throughout or from the beginning to the end of the day.

But it seems to me the defendant was not in a position to be entitled to payment, and that readiness and willingness on the plaintiff's part to go on with and perform his part of the agreement is sufficiently alleged. It appears to me that although the defendant was not bound to deliver the peas to Fitzhugh until the 15th November, still they were required to be in readiness for delivery on the 12th, or it could not be known what quantity the plaintiff was to pay for—he was to pay so much per bushel of 60 lbs. in bond. Now it occurs to me that the words “in bond” assist the construction of the contract and shew this, for we can imagine the peas exported from Upper Canada to Oswego, liable to duty there, and stored in under bonds in a government or bonded warehouse, and there awaiting payment by the plaintiff on the 12th; after which, and or before the 15th, the defendant would be bound to pay duties, take them out of bond and deliver them to Fitzhugh. If not so, and plaintiff was to relieve them from bond, still it would equally follow that they should be there in bond to determine the quantity, or weight and number of bags to be paid for by plaintiff, &c.

In any point of view therefore, it seems to me the declaration is good and the grounds of demurrer insufficient. I do not see there was any election in the plaintiff to pay for any quantity between 1000 and 1500 bushels, but the defendant engaged to sell not less than 1000 and from that to 1500 bushels; and unless previously provided and in bags, how could plaintiff tell for how much peas or for how many bags he was to pay? and yet defendant claims payment for both at the day, although he may not have owned or been possessed of either peas or bags.

McLEAN, J., and RICHARDS, J., concurred.

Judgment against the demurrer.

CARTER V. SULLIVAN ET AL.

Commissioner—Bail.

A commission granted to a person to take recognizances of bail &c., within the Gore District, will not, after the passing of the statute 12 Vic., chap. 7, empower him to take recognizances of bail in the county of Brant after its separation from the Gore District.

The acceptance of a confession of judgment with stay of execution until a period not later than the plaintiff could otherwise and in the ordinary course have obtained execution, will not discharge the defendant's bail.

DEBT, on recognizance of bail acknowledged on the 25th July 1853, in the Court of Common Pleas at Toronto, by defendants, as bail for Clifton and Clark, who were, if plaintiff obtained judgment, to pay or render them to the sheriff of Brant. Judgment, and omission or render alleged.

Second plea — That defendants came before George M'Cartney purporting to be a commissioner for taking bail in the county of Brant, and entered into the recognizance of bail within that county, but that the said McCartney was not a commissioner for taking bail within the said county at the said time, when &c., appointed by the Court of Queen's Bench or Common Pleas according to the statute.

Fourth plea—That the action was brought after the 1st July, 1853, and the passing the statute 16 Vic., chap. 175, to improve the practice &c.; and that after defendants became bail and before judgment, to wit, on the 11th October 1853, said Clifton and Clark, without defendants' consent, leave or license, confessed the said action £50 damages, with leave to enter upon judgment forthwith, but with stay of execution until the seventh of November then next, when, if they made default in payment of £36 9s. 2d. and interest from date, the true debt and costs, plaintiff might issue execution, &c.; that judgment was entered on the fourth of November, 1853; a *ca. sa.* issued on the ninth of November, 1853, upon default of payment &c. Yet that plaintiff could and might have obtained judgment and execution thereupon long before the time mentioned in said cognovit, to wit, on the twenty-fifth October 1852, and, to wit, fourteen days before the issue of the said *ca. sa.*, had plaintiff diligently prosecuted his said suit as he ought to have done; and that such cognovit was given without defendants' knowledge or consent, &c.

Replication to second plea—That said McCartney was a commissioner for taking bail in the said County of Brant; appointed by the justices of the Court of Queen's Bench; to the country, and issue.

Replication to fourth plea—That plaintiff could not have recovered judgment nor issued execution at any time before the expiration of the time in the confession mentioned &c.; to the country, and issue.

At the trial, before the Chief Justice of the Court of Queen's Bench, at the last assizes held in and for the United Counties of York and Peel, it appeared that the recognizance of bail was acknowledged before George McCartney, acting under a commission granted by the Chief Justice and two justices of the Court of Queen's Bench, dated the 7th August, 1847, 11 Vict., empowering him to take recognizances of bail &c., within the Gore District.

The jury found a verdict for the plaintiff, subject to the two points reserved, namely—

First, whether the commission in evidence authorized the commissioner to take the recognizance of bail in the county of Brant.

Second, whether the acceptance of the confession of judgment, with the stay of execution until the fourth day of the following term, whereby the plaintiff was deprived of the opportunity he might otherwise have had of applying for and obtaining special execution under the late statute at a period earlier than the day appointed for the issue thereof by the terms of the cognovit, discharged the defendants as bail.

In Hilary Term last, *A. Crooks*, for defendants, obtained a rule on the plaintiff to show cause why the verdict should not be entered for the defendants on these two issues, according to the leave reserved; citing *Brown v. Robertson*, 4 Dow., 256.

Crawford, for plaintiff, shewed cause, and contended that the commissioner is an officer appointed by the court, and is not affected by the statute 12 Vic. chap. 79, which applies only to county officers.

That the defendants' having given notice that the bail had

been put in before McCartney, as commissioner &c., should be estopped from now saying that he is not a commissioner. *Brown v. Robertson*, 4 Dow. 256-66; *Kemp v. Thistle*, 4 Dow. 688.

Crooks in reply: That it is immaterial whether the officers of the county are appointed by the Crown or the courts they are both a class whose authority is at an end by the act.

MACAULAY, C. J.—The statute 12 Vic., chap. 78, for the abolition of districts &c., enacted by section 18, upon the separation of a junior county into an independent one, none of the courts or officers of the senior county or of the union shall as such have any jurisdiction whatsoever in or over the said county so disunited from such union, anything in their respective commissions or in any act of Parliament, either of this province or of the late province of Upper Canada, to the contrary notwithstanding.

Section 37 enacted that Her Majesty's justices of the peace, and other persons holding commissions or office, or bearing lawful authority in the different districts in Upper Canada &c., should continue to hold, enjoy, and exercise the like commission, office, authority, power, and jurisdiction within the county or union of counties to which judicial or other proceedings were thereby transferred &c., as if their respective commissions or other authorities were expressed to be for such county or union of counties; instead for of for such district respectively. See also the statute 14 & 15 Vic., chap. 5, sec. 3, extending the above mentioned clauses to that act.

This is not like the case of *McWhirter v. Corbett*, ante 203, which arose under the provincial statute 1 Wm. IV. chap. 6, for separating the county of Prince Edward from the Midland district and erecting it into a district, by section five of which act the continuance of commissions in each respectively was made to depend upon actual residence at the time of the separation; and I find no sufficient authority for holding the authority of the commissioners in this case as extended to or continuing in the county of Brant after its separation.

The subject of the fourth plea forms rather a ground for

an application to the court for relief than a plea in bar; and the cases of *Brewer v. Clarke*, 1 Taunt. 159; *Thomas v. Young*, 15 East 617; *Bowsfield v. Tower*, 4 Taunt. 456-8; *Croft v. Johnson*, 5 Taunt. 319; *Shakespeare v. Philips*, 8 East 433; *Charlton v. Morris*, 6 Bing. 427; *Surman v. Bruce*, 10 Bing. 434; seem to have been all of that description.

I find no authority for holding a confession not delaying execution to a period later than it might be obtained by the ordinary course of things a discharge of the bail in law. Nor do I think loss of opportunity, that might have occurred under the late act, of obtaining speedy execution, has such an effect. It was possible, but improbable; and the substance of the issue is, whether it was a negligent oversight or such an indulgence not consented to by the bail as discharged them on the evidence. I think that issue correctly found for the plaintiff.

McLEAN, J. and RICHARDS, J., concurred.

JOHN DUFFY V. JOHN HIGGINS AND HERMAN WITTRICK.

Replevin.

To a declaration in replevin defendants made cognizance and justified, for that before the time when &c. one O. D. was seised in fee of certain lands, being the same lands upon which defendants took said goods and chattels &c., and being so seised, demised the same to plaintiff from year to year at £10 per year, and that plaintiff entered &c.; and that after said tenancy had been so created, and after plaintiff had occupied said premises thereunder for upwards of two years, to wit, on &c., said O. D. by deed conveyed the fee simple and reversion in said lands and premises to one G., who thereupon became seised and entitled to the rents then and thereafter to become due, and that said G. afterwards, to wit, on &c., whilst plaintiff was still holding under said demise, by deed conveyed the fee simple and reversion to said lands and premises to defendant, who thereupon became entitled to receive the rents then and thereafter to become due by virtue of the said demise; and that after the making of said last mentioned deed, plaintiff continued to hold and enjoy the said lands and premises until the expiration of three years, and because £30 rent was in arrear and unpaid, defendants justify as landlord and bailiff the taking of said goods &c. as for and in the name of a distress for rent.

Plea—That at the time of making of the alleged deed by the said O. D. to the said G., the said O. D. was disseised of said close in which &c., and plaintiff then occupied the same, and claimed the fee simple thereof, *absque hoc* that the said O. D. by said deed conveyed his reversionary estate or interest in said close, in which &c., to said Gwynne.

Held, bad on demurrer on the ground that said plea sets up three separate and distinct answers to the avowry, &c.

Replevin. Declaration states, for that defendants, on &c., in the township of York, in the county of York, took the goods and chattels of the plaintiff, to wit, &c., and unjustly

detained the same against sureties and pledges, until &c., wherefore, &c.

Avowry and cognizance, by Wittrock, as landlord, and Higgins as bailiff, and justly &c., because they say that long before the time when &c., in declaration mentioned, to wit, on &c., one Owen Duffy was seised in fee of certain lands &c., situate in the township of York, being the same lands upon which defendants took the said goods and chattels as in the declaration alleged; and being so seised thereof, then, to wit, on &c., demised the same to the plaintiff for the period of one year from thence next ensuing, and so on from year to year so long as the plaintiff and the said Owen Duffy should mutually agree, at a certain rent of £10, payable at the end of each of such years; and that plaintiff under and by virtue of such demise, entered into and upon the said demised premises, and continued to hold, occupy, and enjoy the same from thence, for and during and to the full end and term of three years thence next ensuing, and until the time of the taking of the said goods and chattels as aforesaid; and that after the said tenancy had been so created as aforesaid, and after the plaintiff had occupied the said premises thereunder as aforesaid, for upwards of two years, to wit, on the 11th May 1853, the said Owen Duffy, by a certain deed of conveyance, duly conveyed the fee simple and the reversion of and in the said lands and premises to one William Charles Gwynne, who thereupon became and was seised in fee simple of and in the same, and entitled to the rents then and thereafter to become due under and by virtue of the said demise; and the said William Charles Gwynne being so seised as aforesaid, afterwards, to wit, on the 19th August 1853, whilst plaintiff was still holding under the said demise as aforesaid, by a certain deed of conveyance, conveyed the fee simple and reversion of and in the said lands and premises to said Wittrock, who thereupon became entitled to receive the rents then and thereafter to become due under and by virtue of said demise. Defendants then make profert of the two deeds, and aver that after the making of the said last mentioned deed plaintiff continued to hold and enjoy the

said land and premises until the expiration of the said term of period of three years, to wit, until &c., and until, at and after the time of the taking of the said goods and chattels as aforesaid; whereupon a large sum of money, to wit, £50, for the rent of three years of said tenancy, ending, to wit, on, &c., became and was due and payable by the plaintiff to said Wittrock, and was then in arrear and unpaid and so remained, until and at the said time when &c., the said Wittrock in his own right well avows, and said Higgins as his bailiff well acknowledges, the taking of the goods and chattels in declaration mentioned, upon said premises, being the same taking in declaration complained of, and justly, &c., as and for and in the name of a distress for rent &c.: verification and prayer of judgment.

Fourth plea, That at the time of the making of the alleged deed by Owen Duffy to said Gwynne as in said avowry mentioned, said Owen Duffy was disseised of said close in which &c., and plaintiff then occupied the same and claimed the fee simple thereof, *absque hoc* that said Duffy by said deed conveyed his reversionary estate or interest in said close, in which &c., to said Gwynne. To the country.

Demurrer to fourth plea, on the grounds:

First, that the said plea sets up three distinct defences or answers to the avowry—namely, that Owen Duffy at the time at which he made the deed of conveyance to said Gwynne was disseised of said premises, whereas in said avowry he is said to have been seised thereof.

Second, That plaintiff at said time claimed the fee simple thereof, whereas by said avowry said plaintiff is said to have been the tenant of said Owen Duffy, and as such not in a position to claim the fee simple of said premises as against his landlord; and

Third, That said Owen Duffy by the deed referred to did not convey his reversionary interest in the premises to said Gwynne: that the said several defences are inconsistent with each other; that they are argumentative traverses; that the last of the three is insufficient in this, that it expressly denies the making of the deed by said Owen Duffy to said

Gwynne, but admitting the same denies its legal effect, and does not deny, as the defendants have alleged, the fact to have been, that by said deed said Owen Duffy conveyed the fee simple of and in the premises to the said William Charles Gwynne, and for that the special traverse is inconsistent with the inducement in the said plea set forth.

The demurrer was argued during this term by *Hallinan* and *Fleming* for plaintiff, and *Gwynne*, Q. C., for defendants.

MACAULAY, C. J.—The plaintiff pleaded to the avowry, and it is not objected to on general demurrer, since the demurrer to the plea. It does not mention the close in which, &c., nor does the declaration describe it. Had the avowry been demurred to, the objection would probably have been found tenable under the provincial statute 14 & 15 Vic. ch. 64, sec. 8.

Admitting that over-due rent would not follow the reversion, accruing rent would do so, and *pro tanto* the avowry is probably good to justify the distress. However an action might lie for distraining for more rent than was due, trespass would not lie.—*Governor of Bristol v. Wait* (1 A. & E. 264), *Sibbald v. Roderiek* (11 A. & E. 38), *Harrison v. Barnby* (5 T. R. 248), *Cobb v. Bryan* (3 B. & P. 348), *Forty v. Imber* (6 East. 454).

I think the plea bad, for the causes of special demurrer assigned; in substance it denies the reversion of Duffy the plaintiff's landlord by alleging his disseisin without shewing any expulsion of plaintiff, his tenant, or how or by whom his landlord was disseised of the fee, unless by the plaintiff himself claiming it adversely to his landlord, which he could not do by mere disclaimer or so long as he held under him.—1 *Roscoe on real actions*, 61-2; *Co. Lit.* 330, sec 611; *Hall v. Surtees* (5 B. & A. 689), *Doe D. Burrell v. Perkins* (3 M. & S. 271), *Doe dem. Leeming v. Skirrow* (7 A. & E. 160, 11 Jurist 133), *Davis v. Lowndes* (6 M. & G. 521; S. C., 4 Bing. N. S. 478) *Parker v. Manning* (7 T. R. 537), *Wilkins v. Uregate* (6 T. R. 62), *Lynett v. Parkinson* (1 U. C. C. P. R. 95-8, 104-9), *Henderson v. McWade* (2 U. C. C. P. R. 14).

If the plaintiff had been ousted and dispossessed of his term and the landlord had been disseised, and the plaintiff afterwards re-entered or regained possession, he would be remitted, and so would the landlord also, owing to the privity between him and his tenant, and being only entitled to possession through him and not entitled to enter to his exclusion.—3 Stephen's Coms. 379-380; Doe d. Daniell v. Woodroffe (10 M. & W. 608); Woodroffe v. Doe d. Daniell (15 M. & W. 769; Co. Lit. S. 693-695, ib. 347).

The landlord being seised in fee could not be disseised while (as alleged) his tenant remained in possession as tenant from year to year, and no title or eviction under a title paramount is alleged.—Archbold's Landlord and Tenant 94; Crabb on real property, secs. 2443-2455.

Then the plea admits the deed from Duffy the landlord to Gwynne, yet denies its legal effect by way of special traverse, that the landlord Duffy did not assign his reversionary interest (as if he had one) because he had no reversion to assign, though when he demised to plaintiff he was seised in fee, a fact not denied, and though the plaintiff entered and held under him from the time of the demise until such assignment, and so continued, for all that is shewn to the contrary, until the time of the distress; the landlord did transfer his reversion by the deed if he had any, and if the deed was correctly framed—this is not distinctly denied. If the traverse itself was good, it is not a simple traverse but a special one, raising the law for the court, whether the reversion did not pass, and the demurrer refers the question to the court. The inducement to the traverse seems to me faulty; it is not a good argumentative denial of the alleged assignment of the reversion of tenancy traversed directly under the *absque hoc*, and therefore the whole replication is demurrable according to Stephen's Plg. 216-7; Com. Dig. Plr. G. 20; Doe d. Williams v. Evans (1 C. B. 717); Doe d. Dunn v. McLean (1 U. C. Q. B. R. 153).

Neither is it at all clear that the traverse itself is good. If it stood alone I should be disposed to hold it bad. The avowry alleges an assignment of the reversion by a deed of which profert is not made. The plaintiff does not deny the

deed under his plea—simply a denial that the landlord assigned the reversion to Gwynne, in manner and form alleged, which perhaps he might do; but he traverses that Duffy by the said deed conveyed his reversionary estate or interest in the close in which &c. to said Gwynne; thus virtually admitting the execution of the deed, but putting in issue its legal effect, which is a matter of law for the court. The object is not to deny the deed nor its sufficiency in point of form to pass the reversion, but to shew it inoperative, because no reversion remained in him at that time, though seised in fee when he demised, is sought to be shewn by the inducement alleging that he had been disseised; but I do not think the inducement aids it or renders it a good traverse, not denying a disseisin sufficiently shewn nor its consistency with the plaintiff's possession now claiming the fee adversely to his own landlord and his assignees. I think the plea bad on this demurrer in the inducement, if not the traverse also.

The objection of duplicity has also much force in it. No doubt the tenant may deny the title set up by the assignee of the reversion, if he shews a title paramount in a stranger to the landlord, or shews the reversionary interest of the landlord at an end or displaced by lawful eviction, or not transferred to the assignee by a valid conveyance: a traverse of the deed in this case or a denial that the landlord assigned the reversion &c., would have thrown on the defendants the onus of proving a valid assignment thereof to Gwynne. But, whatever answer is relied upon must be consistent with the relation of landlord and tenant so long as it subsists, and here the plaintiff has not shewn that relation legally terminated, or that he is not possessed as such tenant; and so long as his possession enures to the benefit of the landlord, he cannot allege the non-continuance of the reversion, without shewing how it ceased to exist, and it is not well done here.

McLEAN, J., and RICHARDS, J., concurred.

Judgment for the demurrer.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor of Upper Canada, the Hon. the Chief Justice of the Court of Common Pleas, the Hon. Mr. Justice McLean, the Hon. Mr. Justice Draper, the Hon. Mr. Justice Burns, the Hon. the Vice-Chancellors, and the Hon. Mr. Justice Richards.*

ON APPEAL FROM THE COURT OF COMMON PLEAS.

McLACHLIN v. DIXON.

Double-front concessions.—Side lines.

In the township of Albion, the lots in the different concessions were originally surveyed and laid out with double fronts; but the Adjala road, which forms the northern boundary of the township of Albion, cuts lots numbers 30 and 31 in the 7th concession diagonally, leaving the eastern halves of these lots broken, and not corresponding with the front or west halves, and no posts or monuments were placed to mark the angles of the east halves.

Held in appeal, that the side or division road between lots numbers 30 and 31 should not run direct from one front to the Adjala road in a direct line, but that the side road should be run from each front to the centre of the lots.

MACAULAY, C. J., C. P., V. C. ESTEN, V. C. SPRAGGE, and RICHARDS, J., dissentiente.

On appeal from the Court of Common Pleas.

Pleas in an action of trespass *quare clausum fregit* to lot 31, 7th concession, Albion.

Pleas—not guilty; and 2nd, plaintiff not possessed.

The action was brought to try a question of breaches.

ROBINSON, C. J.—At the trial, before McLean, J., a verdict had been rendered, that upon the facts proved the right was with the defendant; and the jury, in accordance with the opinion which he expressed, found their verdict for the defendant. The plaintiff moved in the following term for a new trial. It was argued while the late Mr. Justice Sullivan was a justice of that court, and it appears from what was said by the learned Chief Justice of the Court of Common Pleas in delivering his judgment, that his late brother Sullivan, though he took a view of the case at first unfavorable to the verdict, inclined afterwards to the opinion that the case had been rightly disposed of at the trial, and that the survey made by Mr. Prosser, a surveyor, was properly treated by the learned judge at

Nisi Prius as made upon a more correct principle than either of the surveys upon which the plaintiff relied.

Before judgment was given upon the motion for a new trial, Mr. Justice Sullivan died, and the case was again argued, in order to give to the parties the advantage of having the judgment of Mr. Justice Richards, who succeeded him. After taking time for consideration, the court gave judgment, ordering a new trial, a majority of the court not agreeing with the view of the case which had been taken by Mr. Justice McLean—to which view, however, that learned judge still adhered. This judgment has been appealed from. The case turns upon a legal question which evidently leaves room for doubt—since four judges who heard the point argued seem to have been equally decided in opinion upon it.

The parties are unfortunately involved in an expensive litigation upon rather a small matter.

The defendant holds by a claim of title derived from the Crown in 1838. The plaintiff holds under a patent made to himself in 1850.

In the defendant's patent, which is the elder one, and which is for the east or rear part of lot 30, in the 7th concession of Albion, the quantity of land granted is expressed to be seventy acres more or less. According to the boundaries which he contends for, the area of his land will be about 77 acres—being seven acres more than the Crown professed to grant by the patent under which he claims. If the limit between his part of lot 30 and the plaintiff's adjoining lot 31, be fixed where the plaintiff insists it should be fixed, the area of the plaintiff's land would be reduced to 66 acres, leaving four acres less than his patent expresses.

The plaintiff's patent for lot 31 calls the quantity 34 acres, for which he paid the government as a purchase £17; but if the limit between him and the defendant be fixed according to the survey which he seeks in this action to establish, the area of his lot would then be 83 acres and 20 perches, being an excess of 49 acres above what his patent expresses. If the boundary line between him and

the defendant should be established where it would be according to the survey upon which the defendant relies, the plaintiff would still have nearly 76 acres, being 42 acres more than his patent expresses, and more than he paid for to the government.

It will be seen, therefore, that the plaintiff is not a little unreasonable in what he is contending for ; still, if the law is with him, it is in his discretion to insist upon it, and we have no discretion to withhold from him any portion of what he may in our opinion have shown himself to have been legally entitled to.

When I speak of the quantities of land expressed to be granted by the respective patents, it must be borne in mind that those quantities are stated in each patent with the qualifying words "more or less." This shows want of certainty at the time of making the grants as to what the exact area of each tract might be found to be, as laid out upon the ground, and this in most cases where the variance turns out to be small, makes the fact of variance of little weight as an argument on one side or the other. Where the variance is so remarkable and so striking, however, as it would be in the present case if the plaintiff's claim should be upheld, it does seem to afford strong grounds for inferring that what is contended for in any such case must be inconsistent with the intention of the Crown in making the grant ; and this should make us apprehend that the claim is grounded on a fallacy, and that something is assumed as a foundation for the construction insisted upon which cannot be reconciled with the original plan of survey.

Yet we have seen instances, and those not a few, in which the undeniable application of legal principles, and of the provisions of our provincial statutes which have been passed for settling these disputes, has driven the court to a decision very much at variance with what has seemed to have been the understanding and intention of the government in making these grants. The provincial statutes to which I refer are excellent, I trust, in their intention, and have been framed with judgment in a true spirit of equity,

but like all these general rules, they will occasionally in their application produce hardships. I mention this only to shew that the effect which a decision in favor of the plaintiff must have in so unreasonably increasing his quantity of land, cannot be taken as sufficient to prove his claim unfounded, though it may well suggest a strong doubt, but on close examination, it will be found to be so.

The 37th and 44th clauses of our last statute for adjusting disputes in regard to boundaries, 12 Vic., ch. 35, shew very clearly that where townships have been surveyed as the township of Albion was, with double fronts to each concession, that is, with a range of posts to mark the limits of it in the rear of the concession, as well as in the front, that shall be assumed to have been done with the intention of issuing patents for the front halves and rear halves separately, to different grantees, as if they were distinct lots; and as the posts planted with this view along the rear of the lot in each concession will, in such cases, mark the front of the rear half, and will be taken to define the limits of the half lots by those who settle upon them, the legislature have thought it right to make express provision in such cases for securing the patentees in the enjoyment of the land between the posts planted to mark the front angles of each rear half lot; and they having done this by providing in effect that the front halves and rear halves shall be treated as if laid out separately, like distinct concessions, so that the limits of the rear half lots shall not be subject to be controlled by side-lines, drawn from the posts set to mark the front halves of the same lots, nor vice versa; but in ascertaining the limits between any two lots in either range, the range of front halves and the range of rear halves are to be surveyed and dealt with separately, as being independent of each other, in the same manner as the several concessions lie. Then, bearing this in mind, we are to take up the defendant's patent, which is the elder one, and we see that the Crown granted to the person from whom he traces his title, the rear or east half of lot 30, in the 7th concession, supposed to contain about 70 acres, and described by metes and bounds, the Crown at that time owning

whatever land remained in that concession beyond lot 30, and therefore being at liberty to convey to the grantee what it pleased without danger of interfering with any one as the owner at that time of 31. The description commences at the south-east angle of the rear or east half of lot 30, which angle is admitted to be known and undisputed, so that we have the advantage of a certain starting point. Then we are to go on a certain course ten chains, more or less, till we reach the town line of Adjala. Here again we have a certain point to go to, for the town line of Adjala is known and undisputed, having been actually laid out in the original survey, and been since opened, and having posts placed along it where the several concession lines of Albion intersected it. The distance turns out to be fourteen chains instead of ten, as expressed in the patent; but that occasions no difficulty, for the distance is not given as an absolute one, and we are to proceed in the course named till the town line is reached. The great difference, however, between the actual distance from the post planted by the surveyor and the town line shews that the government either found the plan returned by the surveyor either not corresponding with the width on the ground, or, for some other cause, seem not to have had the means before them of giving a precise and accurate description.

So far, however, there is no difficulty in making out the description that was given. The whole occasion for doubt arises from the next boundary line, which is to run "south 74° west along the Adjala line 35 chains 50 links, more or less, to the allowance for road between lots 30 and 31." Then the description proceeds, "south 39° west 1 chain and 50 links, more or less, to the centre of the concession, along the centre line of the concession, to the place of beginning." I have gone through the whole of the description, in order to place in view the doubt that arises from the extent of the line along the Adjala road, and to shew how it applies. Now, returning to the last established point, we are to go along the Adjala town line 35 chains and 50 links, more or less, to the allowance for road between lots 30 and 31. The defendant says, and says truly, there is no allowance

marked out and visible on the ground between 31 and the rear half of 30. If you could shew me such an allowance, I should have a right to go there, and go no further along the town line, whether the distance should be more or less than 35 chains and 50 links. It is admitted that no allowance for road between the rear half of 30 and 31 was marked out on the ground in the original survey, or had any posts set to mark its position either upon the outer line of the concession, or upon the Adjala town line.

We have abundant means of knowing, judicially and otherwise, that this is not expected to be done in any such survey, except when the allowance for road along such rear half would terminate upon a concession line in rear, and then the road would be marked by the posts which would be set on such concession line, to mark the angles of the lots on each side of it. The division line between this rear half of 30 and lot 31 happening to terminate at the northern front of this range of half lots, and not upon any concession line, but upon the external boundary of another township, which it strikes obliquely, no post was planted in the original survey to mark the intersection of either lot with the Adjala town line. If there had been such posts, they would have served to mark the allowance for road between the two lots, as well as the angles of the lots themselves, and the present dispute would not have arisen. The plaintiff does not deny the fact that no side road between the rear half of lot 30 and lot 31, or allowance for such side road, is to be found either in use or marked out upon the ground, nor has he endeavored to prove that any such road allowance was actually run out, or its position in any way marked out in the original survey, or by any public authority before the patent issued; but he insists that as none such can be traced, as laid out by authority between the east or rear half of 30 and the adjoining lot, we must be guided by the allowance for road that was laid out between the west or front halves of lots 30 and 31, in the same concession, and that we must produce that allowance northerly to the town line of Adjala, and adopt that as the road allowance between the rear half of 30 and the adjoining

ing lot. We cannot do that, I think, because it would be in direct opposition to the 37th clause of the Survey Act, which was framed to meet such cases, and it would in fact produce in this instance the very injustice which that enactment was intended to prevent. The two ranges of half lots having been run, and the lots posted independently along each end of the 7th concession, it has happened in this case, as in all others where a survey has been conducted upon that plan, that lines drawn from the angles of the lots on each end towards the centre will not meet exactly at the centre as they ought to do. Inequalities of ground and other obstacles, and sometimes the carelessness of chainbearers, or a peculiar local alteration, will sometimes produce great deficiencies, and there will never be an exact coincidence, but always more or less of a jog or shoulder in the centre line where the lines ought to meet.

That is the case we see in regard to this concession.

The part of lot 30 which is west of the centre line has been laid out on the ground some six chains and more further south than the part east of the centre line. If the southern side line of the west half of lot 30 were to be produced to the town line of Adjala, it would cut off a large portion of the rear of lot 29, and throw it into 30; but it is quite clear that cannot be done. The defendant can obtain no indemnity on that side for the six chains he will lose on the northern side of his tract if he is to be bounded by the allowance for road, being produced contrary to the statute, from one front of the concession to the other.

The plaintiff, I think, attaches a wrong meaning, and gives in consequence an undue importance to the reference which is made in this part of the description to "the allowance for road between lots 30 and 31." I do not look upon those words as intended to refer to any thing that would be certainly found upon the ground, and that would therefore serve as a guide to shew the breadth of the lot. They were merely inserted to shew that the allowance for road was intended to be excluded from the patent, and therefore that this line along the town line of Adjala was not to be carried full up to the side line of lot

31—but that a chain was to be allowed between the lots for a road.

We are not to look for this allowance for road in order that we may find where the lots are ; but we are first to find the angle of either of the lots, and then we shall know where the road is to run.

In most townships, an allowance for roads between lots, by which people may pass from one concession to another, is made only along every fifth lot, and according to the copy of the government plan produced in evidence that is the case in this township. It happens that one of these allowances falls between lots 30 and 31, and it is noticed in the description, in order that it might be seen that the government were not including the road in their grant. The grantee may carry his line to the road allowance only, but not across it. If there had happened to be no allowance between these two lots, then the boundary line which gives rise to this law suit would no doubt have been described thus : “ then south 74° west along the Adjala line 34 chains and 50 links, more or less, to the limit between lots 30 and 31 ; ” and the question would then have been to find that limit, which appears to us to be in effect the same question that is before us now ; and it would not, I think, have been solved by producing the division line between the front or west halves of 30 and 31—for that would have been contrary to the principle established by the 37th clause of the statute 12 Vic., ch. 35. If we could not have fixed upon the limit between the lots in the rear by these proofs, neither can we determine in that manner the position of the allowance for road ; for the latter is a mere necessary to the former, and dependent upon it. It is as if the description had run thus : “ then south 74° west along the Adjala town line 35 chains and 50 links, more or less, to within one chain of the limit between lots 30 and 31, being the allowance for road, or, as we have seen in some patents, “ to the limit between lots 30 and 31,” leaving out the allowance for road. Then comes the question, if we are not permitted to fix the boundary between lots 30 and 31 in rear, by producing the allowance for road at the front of

the concession, how are we to ascertain it? And here I feel the full force of the difficulty which has been stated by some of my learned brothers, that there is a want of any thing definite and precise throughout the description after reaching the Adjala town line. We are told to go 35 chains and 50 links, more or less, to an allowance for road, which the government may have supposed had been laid out, and would be found marked upon the ground. But no such allowance is to be traced there, and thus the distance is rendered vague and uncertain by the line being appointed to terminate at something which cannot be pointed out. There is some appearance at first sight of a tendency in the next expressed boundary to render this last definite and certain, "then south 39° west 1 chain and 50 links, more or less, to the centre of the concession," but there again the value of the expressed distance of 1 chain and 50 links as a means of solving the difficulty is destroyed by the introduction of the words "more or less." If the distance had been given in absolute terms, then we should have known that the previous boundary was required to be carried westerly along the Adjala line till we came to a point distant 1 chain and 50 links from the centre of the concession, and that would have been a direction easily followed, but the qualification of "more or less" shews that there was an uncertainty as to what might be the distance between the Adjala town line and the centre of the concession, at the point where we are to meet the town line, inasmuch as the length of the boundary along the town line had not been absolutely stated. The western line of 30 not being marked by any monument planted on the town line in the original survey, there is nothing on the outer line of the concession to shew where the allowance for road along the rear side line of 30 is to be; so that in effect we are told to go along the town line as far as may be necessary to reach the undefined and unknown point, which will be found to be at an undefined and unknown distance from the centre line of the concession.

But taking this to be literally so, and admitting the objection of vagueness and uncertainty to apply with as

much force as possible, even so as to compel us to give up in despair the attempt to fix the limit between the two lots, that would actually not be a decision in plaintiff's favor. This later patent of 31 gives no description of that lot, but merely calls it by its name, and in effect makes its boundary to depend upon the limits of lot 30, which the Crown had previously granted. And when we see that this patent assumes to convey only about 34 acres to the plaintiff, as the extent of his lot 31, he is bound to shew something more than that the limit of lot 30 is uncertain, before he can call upon a jury to dispossess the owner of that lot, of any land in order to swell the contents of the plaintiff's lot from 34 to 83 acres.

So long as we cannot tell with precision where the northern limit of 30 is, we cannot pronounce how far the southern limit of 31 can be carried, and the benefit of any doubt ought surely not to be given to the one who already occupies more than twice the quantity of land that he had reason to infer was comprehended in his patent.

The plaintiff, however, does ask to have a certain proof applied which, if it can be admitted, would fix the division line with precision. He insists in having the allowance for road carried through from the front, and that the defendant should be compelled to abide by that, although from his southern side line not tallying with the side line of the front half of lot 30 he would lose 6 chains in width along his whole tract, by being made to range with the front of lot 30 on one side, while he is not allowed to range with it on the other.

If this be the law, we must admit it to be a hard law. But I do not think that the defendant can be placed in that unequal position consistently with the spirit or letter of the Survey Act.

What the plaintiff seems chiefly to rest upon for supporting his claim is, that inasmuch as only one angle of the rear half of lot 30 was marked by a monument on the concession line, and no monument was placed to mark the western angle, nor any monument was placed at the north-east angle upon the concession line, it cannot be said that

this concession was surveyed (in the words of the 37th clause) with double fronts, because, so far as this part of the concession is concerned, posts were not planted on both sides of the allowance for road at each end of the concession; and so there are not posts at the rear end of lot 30—that is, not a post at each angle—from whence lines can be drawn to the centre of the concession, to form its limits on both sides. No doubt that is true, because the 7th concession line, near the centre of lot 30, is merged in the township line, and the 8th concession runs out and ends there, and there could be no further posting along that concession.

But it is not the less true that the 8th concession was run with a double front, and that posts were planted at both sides of those allowances for road between the 7th and 8th concessions, and at both ends of those allowances where they reached from one concession to another.

This lot 30 was not in fact an exception, because there was not, and would not be any allowance for road leading across from the 8th concession to the centre; between lots 30 and 31, the concession having terminated near the middle of lot 30. Should it then follow that this lot 30 is taken wholly out of the operation of the 37th clause, not because it was not a concession surveyed with double fronts (because unquestionably it was, so far as it was possible in the nature of things), nor because the allowance for road was not marked at the rear of the 8th concession as well as the front, because the surveyor who laid out Albion had done with the 8th concession, and had finished his survey in that direction, before he had reached or could make any such allowance for road. It is quite true that it has followed as a consequence. It seems that no post or posts had ever been planted to mark the limit to the westward of the rear of lot 30, or the termination to the northward of the allowance for road.

And this being so, the defendant argues that we cannot treat the 8th as a double-fronted concession any further than the south side of this lot 30. It is true, the 37th clause cannot be literally carried out, so as to find the northern side line of the rear half, by running down a line

from an original post on the back side to the centre of the concession, because there has never been any post planted there. But I do not think that it follows from these, that the front and rear range of lots in the 8th concession are not to be treated through its whole length as irrespective of each other, or that being so to the prejudice of the defendant, where the survey has placed his portion of lot 30 six chains and more to the south of the front half of that lot, he can be controlled by the post placed on the north side of lot 30 in front, and thus prevented from gaining on the one side what he has lost on the other. The principle of double fronts must apply throughout the concession, as it seems to me, or not at all. I mean, it cannot be carried through in regard to all the lots but the last, and then, because no post is to be found at one of the rear angles of the last lot, the old principle of the front angles on a concession governing throughout, be adopted in its place. This could hardly fail to be unjust in its operation generally, as it certainly would be in the present case, and the legislature could never, I believe, have intended it.

The negative effect of their act still continues, I think, that you shall not take the front posts of the whole lot as your guide unless where the concession was run out as a single range of whole lots, because, when that was not the case, the front posts ought not in reason to govern through the whole extent.

It is only by having the survey of Walsh confirmed, which was made upon the principle of producing the allowance for road from the front, in order to govern the limit of lot 30 in the rear, that the plaintiff can expect to succeed, for the other surveys, made upon an idea of an equitable compromise, were not capable of being sustained either under statute or the language of the patent.

Mr. Walsh seems not to have had entire confidence in his method of bounding the defendant's lot; for he admits that while he made this survey at the plaintiff's request, before the plaintiff had obtained his grant, in order to shew him what land would come under the designation of lot 31, in case he should make the purchase from the govern-

ment, yet he recommended him not to pay for that part of the land now in question, which would be cut off by producing the allowance for road from the front; and Mr. Walsh, when questioned, seems not to deny that when he first saw the defendant's patent, he told him if he had been aware of its terms before he made his survey, he would have run his lines differently. It is quite natural for the plaintiff to ask how the northern boundary of the rear part of 30 is to be determined if no allowance for road was ever laid down between it and 31 in the rear half of the concession, and if no attention is to be paid to the position of the road allowance in front. The question may be one difficult to answer, and it is evident that the surveyors were all perplexed by it; but it must be recollected that the plaintiff would not prove his case if he should merely shew that there is an insuperable difficulty in fixing upon the true boundary between him and his neighbour. He must establish more than that to enable him to dispossess the defendant. Already the plaintiff has more than double the quantity of land that the government professed to sell to him; and before he can increase the excess at the expense of the defendant, he must shew conclusively where the boundary is between his land and the defendant's, and must shew that the defendant has gone beyond it. He does not shew this, I think, when he insists upon the words in the patent, "to the allowance for road between said lots 30 and 31," as being the only words that can be of use in determining the question, because there is no such allowance in the rear, of which the position can be pointed out, and the allowance between the lots in the front range has nothing to do with the question. If, however, the learned judge who presided at the trial was right in his opinion upon this point, as I think he was, it does not follow that the patent is necessarily incapable of receiving such a construction as will settle the boundary. It is by no means a new case that a patent should give a distance, as this does, expressed in chains and links, but with the addition of the words "more or less," and referring to something erroneously supposed to exist, by which that which is apparently uncertain

is to be controlled and rendered certain. We have often had before us, in other cases, patents containing descriptions in which, on a view of the boundary lines, will thus stand "so many chains, more or less, to a post marked," &c., when it appeared that no such post could be found, or its position in any manner proved—and when it was even stated to be certain that the post was never planted to mark the point; in such cases the distance must, from necessity, be taken as the guide when no account can be got of that which was referred to for controlling it.

If the patent of lot 30, instead of referring to an allowance for road, had run thus: south 74° west, 35 chains and 50 links, more or less, to a cedar tree, or to the bank of a small stream, and it were made to appear that there was no sign of a cedar tree, and nothing like a stream in that part of the township, we would only then be governed by the 35 chains and 50 links, and must take that rather than hold that the patent granted nothing. I consider the effect of the manner in which this line is laid down in the patent is, that you are to go on the course mentioned 35 chains and 50 links, unless you find that you sooner come to the allowance for road between lots 30 and 31; in which case you are to stop when you get there, and if you find that the distance to the allowance for road is more than the 35 chains and 50 links, you are still to go to the allowance, which, wherever you may find it, is to be your guide, and not the distance expressed. In other cases of this kind, when the object referred to is not to be found, courts have held that the distance mentioned must, of necessity, govern the length of the line; and we must hold the same in this case. Mr. Hallinan, on the part of the plaintiff, has urged upon us that as we find in regard to this lot no double front posted, and so no allowance laid out in the rear of the concession, we should take the government plan, or original survey, as our guide as to where that allowance was intended to be, if we cannot let the line be produced from the north side of 30, in the front of the 7th concession. But we can no more do that, than allow the front lines and posts to govern the rear, if it is right to hold that the 7th concession

is within the 37th clause of the statute, as being a concession surveyed with double fronts. To be governed by the map in such cases would always produce confusion, and would always defeat the intention of the act, since it is quite certain that the surveyor in every case meant to lay out on both sides of the same concession an equal number of lots of the same width respectively; and his plan only represents his scheme of survey, not his actual work on the ground, with all its imperfections. In all such cases the lines would be found to be laid down straight from front to rear, as if they had been chained through; but we know that all that is done upon the ground is to chain off the lots on each front, and set posts. No lines are run from either end to the centre in the original survey; and when this comes to be done afterwards for the purposes of individual occupants, it is always found that the lines do not exactly meet. They would never do so when each front of the concession has been separately posted; and the jog, as it is commonly called, is often very considerable. It was a conviction of this that led to the provision made by the legislature, which is entirely equitable and convenient. For these reasons I agree with the learned judge who tried the cause.

It does not seem to me that the question presented in this case is a new one. We have often had before us cases in which the description in a patent has referred to monuments which were assumed to have been planted, but which in fact were not, and where, in consequence, it has been considered that the expressed distance must govern, though qualified by the words "more or less, to a post marked," &c. We have also seen cases in which, owing to the interference of a small lake or marsh, an angle of a lot was not marked out by any post or other monument, though the other angle was marked out on the ground. In such cases, before the statute of 1819, I suppose the only course would have been to give the lot its width expressed in the patent, though since that act the width would be determined by dividing equally the space between the nearest two ascertained monuments upon the concession line. The survey of this township having been made after that statute, the surveyor

must have known that the front angles were expected to be marked, and that these half lots were to front on the 8th concession line, and to be laid out independently of the half lot in front. Why he did not think it necessary to mark both the side limits of this half lot in front I do not understand, for there was no difficulty in doing it, and it was not the less necessary, because the front of lot 30 happened not to be a straight front, but to follow the deflection occasioned by the Adjala town line. The government seems naturally to have assumed that posts had been set on that town line to mark the fronts of the lots to the end of the range. If such posts had been set there, they would, according to the scheme of survey, have marked an allowance for road between the angles of 30 and 31 on the town line. Such marking down of the road would have been conclusive for ever as to the position which it must occupy, unless changed by some legislative measure. The Surveyor-General, I suppose, judging from the plan of survey that had been returned to him, assumed that this allowance for road would be met with at the end of about 35 chains and 50 links on the town line; and the description was framed in such terms as to make the actual position of the road a limit which must necessarily govern, whether the distance should be found to correspond actually or not.

But there having been no road marked down in fact, and so nothing to check the expressed length of the line, that must be carried out, and will determine the position of the road instead of the allowance for road determining the width of the rear end of lot 30, as it would and must have done if posts had been planted in the original survey to mark it.

It is wholly inconsistent, I think, with either the spirit or letter of the 37th clause of the statute 12 Vic., ch. 35, that the side line of either of the ranges of lots in a concession, which has been laid out upon the plan of leaving double fronts, should be governed by the lots in the other range, and it is clear that the allowance for road between lots in the rear range, must in like manner be independent of the allowances between lots in the other, because those allow-

ances are nothing more than the space of a chain reserved between the two lots. The position of the reservation must follow the position of the two lots, and must depend upon the principle which you are at liberty to adopt for fixing the boundary of the lots, and it is in my opinion out of the question that we can allow one side of a lot which has been laid out in a double-fronted concession to be governed by the side line of a lot on the other side of the centre, unless we allow the other side to be governed by the same principle, which we certainly cannot do in this case as regards the southern side of lot 30; under the circumstances, that line in the description which refers to the allowance for road between 30 and 31 in rear can have no effect, because there being no evidence that any such allowance for road was in fact laid out and marked upon the ground, we have no proof of its position, or rather, I should say, of its existence, and we are not authorized to establish its position by producing to the rear of this concession the allowance for road that is marked by the posts planted in front, any more than we could take as our guide the allowance for road between lots 30 and 31 in any other concession of the township.

The correct course under the circumstances, I think, is to be governed by the expressed distance of 35 chains and 50 links, and not to go beyond that, along the township line, in order to reach the point which is distant 1 chain and 50 links from the centre of the concession; because that is not a distance given in absolute terms, but with the qualifications of "more or less," being founded on a conjecture confessedly uncertain as to the probable position of the road allowance. There being no proof of any road allowance, we can only take the distance, and that necessarily fixes the position of the road allowance, which had not been fixed before; for it is clear there is to be the usual width of an allowance between lots 30 and 31 in rear.

It follows that the judgment of the Court of Common Pleas upon the application for a new trial, which proceeded entirely upon a legal question, must be reversed, and the rule *nisi* discharged.

BLAKE, Chancellor, concurred with the Chief Justice of the Queen's Bench.

MACAULAY, C. J. C. P.—In the observations I am about to make in addition to what I said in the court below, I wish to be understood as meaning by the word “north” that part of the township of Albion which is bounded by the Adjala road; by the word “south” that side of the township, or end of the concession, from which the lots are numbered; by the word “east” that part of the 7th concession, or of the half lots in that concession, which front on the allowance for road between the 7th and 8th concessions; and by “west” that part of the 7th concession, or of the half lots in that concession, which front on the allowance for road between the 6th and 7th concessions.

It still appears to me the question does not depend upon the patents, but upon the original survey and the statute. It might have arisen before the issue of any patent for the defendant's lot, No. 30, or for either lot, as if all the other lots had been granted except these two, and the inhabitants had opened the road directly through; and as to the east part, an information of intrusion, or a judgment, for an obstruction, was prosecuted; and I look upon the patent for No. 30 material only as confirming what the plan of the original survey imports—namely, that there was a part of lot No. 31 lying between the centre of the 7th concession and the Adjala road, to the east, with an allowance for road between the east parts as well as the west parts of Nos. 30 and 31. Without the patents, the original or government plan (and I suppose the field notes, had they been produced in evidence) show that a continuous allowance for road was made between those lots from their west front to the Adjala road. Whether any part of either lot extended beyond the centre line of the concession (so as to leave an east part as well as a west part divided by such centre line) would depend upon the original survey, as ascertained upon the ground. Posts were planted at the south-west angle of No. 30, as the allowance for road between Nos. 30 and 31, in their west front; and at the

intersection of the 6th and 7th concessions road with the Adjala road, or the north-west angle of No. 31; also at the south-east angle of No. 30, and at the intersection of the 7th and 8th concessions road with the Adjala road, forming the north-east angle of the said lot No. 30. But no post was planted on the Adjala road, to mark the allowance for road or limit between the east parts of Nos. 30 and 31 on that road: that was to be determined by the information afforded by the plan, field notes and the posts that were planted to indicate the boundaries of these lots. When those posts are examined and the distance measured, I understand it turns out that the west front of No. 30 exceeds 30 chains (the proper width of the lot) by $4\frac{1}{2}$ chains, and that there is also an excess on the west side of No. 31, but to what extent not proved. It also turns out that the post at the south-east angle of No. 30 is not opposite the south-west angle of that lot, on the course of the governing line of the concession, but is to the north of it $6\frac{1}{2}$ chains; and that the distance from the south-east angle of No. 30 to the Adjala road is 14 chains. It is to be remembered that the depth of the concessions in this township are 66 chains 67 links, or 33 chains $33\frac{1}{2}$ links for half the concession, which, by 30 chains for the width of lots, would make full or half lots of 200 and 100 acres respectively.

The provincial statute 50 Geo. III. ch. 1, sec. 12, which is still in force, enacts, that all allowances for road made by the king's surveyors, in any town, township, or place, already laid out, or which shall be made in any town, township or place within this province, &c., shall be deemed common and public highways, &c., unless altered as therein provided.

The 38 Geo. III. ch. 1, does not seem applicable; but the 59 Geo. III. ch. 14, has always been treated as declaratory and prospective, as well as retrospective; and (though not particularly mentioned in the evidence) the township of Albion was no doubt surveyed and laid out after the passing of that act, and before the 12th October, 1838, the date of the patent for the east half of No. 30. From the time of the original survey, and at the date of that patent, and

until the passing of the 12 Vic. ch. 35 (30th May, 1849), the determination of the present question depended upon the 50 Geo. III. ch. 1, sec. 12, and 59 Geo. III. ch. 14, secs. 2 and 9. The 2nd section declared the unalterable boundaries of townships, concessions, and lots; and sec. 9 enacted that the front of each concession, lot, or parcel of land, should be considered to be and was thereby declared to be that end or boundary of such concession, lot, or parcel of land, which was nearest to the boundary of the townships from which the several concessions thereof were numbered. This act said nothing of alternate or of double fronted concessions, both of which are mentioned in the 12 Vic. ch. 35, secs. 37 and 38.

The omission was specially provided for in the township of Osgoode by the 10 & 11 Vic. ch. 54, passed in the year 1847, amended by 13 & 14 Vic. ch. 86, which restricts its operations to certain concessions. That township had been surveyed in concessions with double fronts: whether before or after the passing of the 59 Geo. III. ch. 14, I am not aware. The act of 1847, at the special instance of the inhabitants, enacted that the side lines should be run from the posts planted on one side of the concession to those on the other of corresponding numbers, &c., without regard to jogs, in order to provide direct roads through the concessions, although the effect would be to prevent the side lines being run parallel to the governing side lines of the concessions. This act, though local in its object, is material as indicating that each side of a concession laid out with double fronts and granted in half lots was in the intent and meaning of the 59 Geo. III. ch. 14, to be regarded as the front of each half concession respectively, and that the side lines should be consequently run from the posts planted to mark the front angles of the half lots on each respective front to the centre of the concession, parallel to the governing side line. It is probable this had always been considered the proper course in townships so laid out. Then, looking at the present question, after the township of Albion had been thus laid out, and before the grant of 1838, or between that period and the passing of

the 10 & 11 Vic. ch. 54, and 12 Vic. ch. 35, respectively, what was the allowance for road or division between the east parts of Nos. 30 and 31, 7th concession, lying between the centre of the concession and the Adjala road?

Before the patent of 1838, I apprehend that (whatever might be the legal course to be adopted in relation to full double-fronted lots) the allowances for side roads, or for division or side lines between broken lots at the extremity of the concession, would be from the west or proper front through to the Adjala road; and that this rule would be applied, not only to the allowance for road between Nos. 30 and 31, but to all such roads and divisions or side lines of the broken or incomplete lots bounded by the Adjala road, along the whole of that side of the township. The provisoes in the 35th and 36th sections of 12 Vic. ch. 35, seem to me to aid this view. Posts planted in the rear of concessions being thereby made to govern, where no front posts had been planted in the broken fronts of lots owing to lakes or rivers; and although no provision is expressly made therein, except as to the courses of the side lines in townships or concessions whose ends are so broken, or which seems to me tantamount (not bounded by the governing course, owing to a diagonal road allowance running between adjacent townships and cutting about-lying lots on that side), still I think the cases therein provided for and the present are analogous. Those sections, however, are intended to prescribe the courses of the side lines between lots, rather than the points from which such courses are to be run. It is sec. 32 that more immediately applies, by enacting that all boundary lines of townships, all concession lines governing points, and all boundary lines of concessions, &c., and all side lines and limits of lots surveyed, and all posts or monuments which have been placed or planted at the front angles of any lots or parcels of land, &c., shall be and are declared to be the sure and unalterable boundaries of all and every such township or concession, lot or parcel of land, respectively, whether the same shall upon admeasurement be found to contain the exact width, or more or less than the exact

width, expressed in any letters patent, grant, &c., in respect of such township, concession, lot, &c., and such concession, lot, &c., shall embrace the whole width contained between the front posts, monuments or boundaries, planted or placed at the front angles of any such township, concession, lot, &c. (see this section to the end.) The whole scope of that section and of the act shows that the original survey was to control the patent, and not the patent to control the survey; and that the patents or grants are to be applied by reference to the original survey, posts, &c., as found upon the ground, or, failing therein, by reference (if need be) to the government plan and field notes of the original survey of record in the office of the Commissioner of Crown Lands (see sections 35 and 36), and not to the descriptions contained in the crown grants.

Now the only posts planted to mark the front angles of the east part of lot No. 30, were at the south-east angle, and the Adjala road, 14 chains apart. The only posts planted to mark the front angles of No. 31 are at its south-west and north-west angles; no post is planted to define the limit or allowance for road between the east parts of these lots on the Adjala road. It is not contended that the east part of No. 30 is to be determined by lines drawn from its south-east angle and its north-east angle, where it intersects with the Adjala road, respectively, to the centre of the concession, which would form a square of 14 chains by 33 chains $33\frac{1}{2}$ links, and reduce the tract much more than, in my opinion, it ought to be reduced; and still why should it not be the limit according to the double-front rule contended for? I do not however think such a construction should be placed upon the statute (though perhaps literally it might) as would limit No. 30 to its east front of 14 chains; because the post planted at its north-east angle, at the Adjala road, was not intended to determine its full width as a complete front, but from that point the front ceased and it became a broken or incomplete lot, just as No. 31 was measured from the opposite point. The northerly or upper part of No. 30, and the easterly part of No. 31, are not indicated by any posts actually planted, so that the

division line or side road between the east parts of these lots depends upon construction.

In the first place, I do not consider the lots as if in separate concessions. They are not so in fact. The statute does not declare double-fronted concessions to be separate concessions, even though granted or described in half lots. There is no allowance for road between the respective halves; and if regarded as in effect double concessions not divided by a road between them, I think there is much in the provisoes to the 12 Vic., ch. 35, secs. 35-36, already referred to, to shew that the allowance for road separating the easterly parts of lots 30 and 31, must be the allowance made on their west front continued to the Adjala road. I consider it a question of intention; and it appears clear to me that the allowance for road made on the west side or end of those lots was intended to be so made, not to the centre merely, but to the centre, if the half lots on the east side of the concession proved full lots; if not, then to the Adjala road, or the end of the township in the direction of that road. I think this the manifest intention of the government surveyor who made the original survey, in relation to all the side roads or limits between the broken lots throughout that side of the township.

In the next place, I do not think the areas or contents of the lots in acres, according to the patents or plan, conclusive. The grant for the east part of No. 30, in 1838, describes it from the original plan, and the contents of both lots, 30 and 31, are in the patents taken from the same source, as can readily be tested by measurement according to the scale on which that plan is made. The patents are framed in reference to the plan, the plan in reference to the original survey, and the legislature declares that survey shall govern. Moreover, the large excess said to exist in No. 31 beyond what the distance indicates and the grant of that lot supposes, arises principally in the west part, and not the east part of such lot. The patent supposes 70 acres in No. 30, and 34 acres in No. 31; but were Prosser's line received, he says, give 76 acres to No. 31, of which a very small portion would be on the easterly side

of the centre line of the concession, so that the west part of that lot contains nearly 76 acres; and that half or part is certainly bounded on the south by the allowance for road between it and No. 30, and cannot be curtailed by construction or by patent. It is said Prosser's line would give to No. 30 77 acres, and that Welsh's line would reduce it to 66 acres, and increase No. 31 to upwards of 80 acres. Compared with Prosser's estimate as in evidence, the difference would be 11 acres in the comparative contents of No. 30, and only from 5 to 7 acres in relation to No. 31, and both cannot be correct. It shews, however, that lot No. 31 would not be increased more than 10 or 11 acres by its supposed encroachment on No. 30, and that No. 30 would not be diminished more than 4 acres below its supposed quantity, as described in the patent. This, I think, affords proof that the east part of No. 30 was intended to be bounded by the allowance for road produced from the west front to the Adjala road, leaving the residue of the tract a broken lot No. 31.

I am not satisfied that bounding the east part of 30 by that road, its contents will not equal 70 acres. If the depth of the half concession be 33 chains and $33\frac{1}{2}$ links, as I suppose it is, hearing nothing to the contrary, the oblong square formed by the 14 chains and the centre line of the concession would contain 46 acres or more, and the irregular figure which the residue of the lot would form would, I think, equal 34 acres, unless there be some inaccuracies in the evidence or plan, as I understand them. Had the south or lower side of the east part of No. 30 corresponded with the south or lower side of the west half, or been 25 chains from the Adjala road, instead of 14, the north boundary of that lot and the allowance for road between it and lot No. 31 would still have been the same, and its contents would have been increased in proportion. So No. 31 might have been less had its southern boundary been nearer the Adjala road than it is. All tends to evince that the contents cannot determine the division line; and if the determination of that line had preceded the grants, it could have been of no consequence to the Crown as owning the whole,

what the contents were, or where the allowance for road divided them, provided it connected the 6th and 7th concession roads with the Adjala road. I do not see that No. 31 being set apart as a clergy reserve can make any difference, although it may have been taken into specification as only 34 acres. Inaccuracies of that kind since the original survey cannot change or alter the original survey, or the effect thereof, under the statutes. The method suggested of tracing 30 chains upon the centre line of the concession to determine the western boundary and length of the east part of lot No. 30, is a mere alternative, unconnected with the original survey. Among other objections to it, it may be observed that it cannot lead to any allowance for road between 30 and 31, any more than the distance of $35\frac{1}{2}$ chains traced on the Adjala road, unless it be to the allowance left on the west sides of those lots. If that road were opened or traced up to the centre of the concession, the proposed line of 30 chains, if traced up from the south-west angle of the east part of No. 30 on the centre line of the concession, would intersect it, unless the 30 chains fell short of it; and so intersecting it, the line should then stop, for no surveyor, adopting that method in an original survey, would have passed and crossed the allowance for road so as to stop it at the centre of the concession: and adopting a line drawn up the centre of the concession, therefore supports my view; for whenever it met the allowance for road separating the west parts of the lots, that road would be indicated as the proper division between the east parts also. To go on and block up that allowance would be so clearly against the intention of the original survey, and so absurd in itself, that no professional surveyor would think of doing it. If the description given of the east part of 30 had been the reverse of what it is, and the first distance had been run from the place of beginning to the centre of the concession (instead of to the Adjala road), and thence up the centre line of the concession, 30 chains more or less, to the allowance for road between Nos. 30 and 31; and if the allowance which divides the west parts of those lots be supposed (as it ought to be supposed) traced up to the cen-

tre of the concession, that line traced up from the south side of lot No. 30, along the centre of the concession, would intersect that allowance for road at right angles, and in the absence of any other allowance for road made on the ground, that would indicate the allowance called for; and I consider the description, as it is the same in effect as if the allowance had been traced through to the Adjala road. Sec. 40 is not applicable; it is intended to provide for the casualties therein specified, not a case like the present; the lots could not be divided along the Adjala road by the method therein declared; no such survey ever was intended, and that section is meant to supply lost posts or monuments, or to supply incomplete surveys that were intended, but omitted to be made; but, if applicable, I see no better course to be pursued than what I think the correct one without regard to it. No place of beginning from which the side lines of 30 and 31 could be run was ever posted or intended to be marked or left on the Adjala road, and I do not see how it can be run pursuant to the statute, except by tracing the allowance from the west side of the lot to the Adjala road. Nor do I think the limits are to be determined by applying the distances specified in the patent of 1838, as if they had been positively expressed, or that there is any more right to adopt the second distance of 35 chains and 50 links as positive, unless an allowance be actually found, than to stop in the first distance at the end of 10 chains, although short of the Adjala road by 4 chains; or that, tracing from the point of intersection with that road at the end of 14 chains, we are to go on $35\frac{1}{2}$ chains, and then stop, because no allowance for road can be found posted or marked on the ground between the east parts of lots Nos. 30 and 31, any more than at a point 1 chain and 50 links from the centre of the concession, or at 5 chains and 50 links from such centre, allowing for the 4 chains' excess between the place of beginning and the Adjala road. I look upon the patent as if it had said 35 chains and 50 links, more or less, to the allowance for road, according to the original survey, field notes, and original plan, and according to the statute in that behalf. It might have hap-

pened that by tracing $35\frac{1}{2}$ chains on the Adjala road, the east part of 30 would contain only 20 acres ; but that, by continuing it to its intersection with the allowance for side road produced from the westerly side or front of the lots, it would amount to 70 acres, or 100 acres ; or that, by so tracing $35\frac{1}{2}$ chains, the line would pass such place of intersection, and cover 100 acres or more ; how could the distance prove its own accuracy or consistency with the actual survey or allowance for road as originally made ? Or it might have happened that the triangular lot No. 31 contained only 20 acres, bounded by the three roads, as represented by the government plan, instead of 34 as assumed in the patent, or 76 to 80 or more, as it is said it does ; while No. 30, divided from 31 by the allowance for road as therein also laid down, contained its full quantity of 70 acres or less, say 60 acres or more, say 90. How could the distances in the patent decide that such was not the correct line of road, or where else it really ought to be ? No quantity is separately expressed in the patent for 31 as the supposed contents of that part of it which is east of the centre line of the concession. According to the plan, it would be of small dimensions, without space for an allowance for road beyond the line of road laid down in the plan in continuation of the allowance made on the west side. And this affords another proof that such a road, and no other, was intended. Moreover, in determining the east part of No. 30 by the application of the patent of 1838, what right is there to add 7 acres to the quantity mentioned in diminution of the east part of No. 31, or why is not quantity, instead of courses and distances, to be adopted ? All are, by the addition of the words " more or less," rendered alike indefinite. It is obvious, and experience teaches, that the courses, distances and quantities indicated in the plan and specified in the grants, may all differ from the actual courses, distances and contents upon the ground when ascertained according to the statutes, which were passed to obviate and provide against these very inaccuracies. Treating the east parts or halves of the lots in the 7th concession as constituting a separate concession, there

would be nothing on the ground but quantity to indicate any lot No. 31, or that the whole triangle east of the centre of the concession did not form part of lot No. 30 like No. 31, on the west half of the concession, except that the post planted (if any) at the intersection of the west front line with the Adjala road, to designate the north-west angle of 31, would shew that no lot 32 was intended. The original plan before the patent, and the patent afterwards, shew that it was intended to leave a broken lot No. 31 on the east side of the centre line of the concession, as well as on the west. The patent calls for an allowance for road bounding No. 30 on that side, and leaving an east part of No. 31 beyond it, and east of the centre of the concession; and seeing by the plan and patent that the south or lower side of the allowance for such road is supposed to be only 1 chain and 50 links from the centre of the concession to the Adjala road, and that the upper side must be still less, by reason of the diagonal course of the Adjala road, there could be no object in leaving such an allowance merely to the centre of the concession, unless it united with the allowance dividing the west halves or parts of those lots. It is manifest, therefore, that no such results could have been contemplated as that contended for by the defendant, and that the object and intention must be disappointed if a continuous road allowance is not established; but that if it be established, the intention is fulfilled. Nothing actually done upon the ground shews that any part of No. 30 extends beyond the square of 14 chains already suggested, or that any part of 31 lies east of the centre of the concession, if the allowance for road made on the west thereof is not continued. The government plan shews that such allowance was to be continued, and the crown patent confirms it; for when the patent calls for an allowance for road, what allowance can be intended or meant except the only allowance that indicates any part of lot No. 31 eastward of the centre line of the concession, or that No. 30 was to be extended beyond a width of 14 chains, or was not to include the whole tract east of the centre line? Regarding it as a separate concession, the plan, though it shews a road

1 chain and 50 links from the centre line dividing the lots into east and west parts, shews also that the allowance for road on the east side is in continuation of the allowance dividing the west parts or halves, so as to lead from the west front through to the Adjala road, and such allowance should be carried out upon the ground ; otherwise the plan would control the survey, not the survey the plan. It may be also suggested that if each half of the concession is to be looked upon as a separate concession, it follows that there can be no jogs or errors, each being in that event entirely independent of the other, and no reference should be made to the west halves or parts of either No. 30 or 31. But this does not appear to me to be a correct view. It is contrary to the fact, for it is only one, not two concessions ; and the statutes 10 & 11 Vic., ch. 54, and 13 & 14 Vic., ch. 86, and 12 Vic., ch. 35, sec. 37, speak as if they were only to apply when the lands were granted or described in half lots. There is, no doubt, a meaning in this in relation to different grantees or proprietors ; but whether granted or described in full or half lots, I apprehend the governing posts and side lines of each half lot, when so laid out, must be adhered to in compliance with the statute. In the present case, the east part of No. 30 is a separate grant from the west half, and the tract is described ; lot No. 31 is granted in one lot, and is not described. It is not granted as being in two concessions, or as partly on one side and partly on the other side of the centre of the concession, but simply as lot No. 31 in the 7th concession. Both are imperfect lots, and deficient in the regular quantity of full lots, and the whole of both might have been included in one grant without any further description, (like a grant that was made of No. 31), but with an allowance for road between them ; or No. 31 might have been first granted and described, commencing at the south-west angle or front on the 6th concession, thence along the lower or southern side of the lot or the allowance for road between 30 and 31 to the Adjala road, and so on to the place of beginning ; or for the first distance, running from the place of beginning along the west front or side of the lot to the Adjala road,

and thence along to the Adjala road to the allowance for road between Nos. 31 and 30, supposed distances, more or less; how, in such events, would such allowance be determined? Had the whole survey of the township been strictly accurate, and the half lots respectively formed separate concessions, the question would be just the same as it is, and should be determined on the same principle. Had the posts planted to mark the south-east angle of No. 30 been in a true line with the one planted at the south-west angle on the other front, when it would have been upwards of 20 chains from the Adjala road, or even had it been at a point still further removed from that road, the question would have been the same; so that the error or jog perceived in comparing the two ends of No. 30 does not materially affect its solution; that depends upon the tests or data in determining the allowance for road on the upper side of No. 30, and dividing it from another broken lot, numbered 31, lying beyond it, or between it and the Adjala road in that direction. It may be a very simple process and a ready way of disposing of the difficulty in this case to treat the east half of the 7th concession as a separate concession from the west half, and to regard the division line or allowance for road between 30 and 31 as not determined or determinable by any original post or actual operation performed upon the ground in the original survey, and to apply the description contained in the patent of 1838 for the east part of No. 30, which preceded that of No. 31, as indicating the boundaries and contents of that part of No. 30, and to give it its full quantity irrespective of No. 31, which can only be the residue of the tract, and of the allowance for side roads made between the west parts of those lots; or, not finding an allowance for such a road marked upon the line of the Adjala road, to adopt the distance mentioned in the patent, 35 chains and 50 links, as conclusively indicating where it ought to be. The consideration is, whether that be the correct way to proceed, seeing that upon the ground other means exist of date anterior to the patent, by which the matter may be determined in accordance with the spirit and intention of the statute, and upon a principle

not restricted to these two lots, but equally applicable, as any correct decision ought to be, to all the lots and allowances for side roads upon the whole northern line of the township, and in all other townships or concessions, under similar circumstances; and seeing, moreover, that although full half lots ought to contain 100 acres each, and that the whole tract east of the centre line of the concession, and bounded by the southern side of No. 30, would not, either as represented in the original plan or upon the ground, contain 100 acres; and yet the part of No. 30, instead of including the whole, is supposed to be and is described as containing only 70 acres, and does not embrace the whole tract, but that an allowance for road is called for on separating it from the east part of No. 31, assumed to have been made in the original survey, and there existing and limiting the boundary. The patent does not for the first two indicate or dedicate an allowance for road, but supposes it had been made in the original survey. The patent of 1838, shews that No. 30 was limited to 70 acres, owing to a supposed allowance for road between it and No. 31. It may be said it likewise shews, as the plan does, that such allowance was assumed to be 30 chains from the intersection of the north west angle of the east part of 30 with the centre line of the concession, wherefore a full half lot was intended, so far as, and on the only side that, the ground admitted. This is true; but it equally shews that although 30 chains on that line would not, with the other lines, embrace 100 acres, but 70 only, owing to its being a broken or imperfect lot, yet such was nevertheless to be the limit. For reasons very evident on reference to the plan, the effect of the Adjala road and the original survey, and having respect to the allowance for road between 30 and 31 on the west side of the concession, the merely accidental circumstance of lot No. 30 being a lower number, and granted before No. 31, or of No. 31 being a remnant, cannot govern the decision: both are remnants in reference to the whole lots respectively. The east part of No. 31 is not a remnant of No. 30, but of its own proper number. However expe-

dient or convenient it may be, therefore, to adopt the patent, I do not think it the method that ought to be adopted, unless it is found to correspond with, and to be sanctioned by the original survey—that is, with what the original survey posts and monuments, and the official monuments in the Commissioner of Crown Lands' office indicate, and the statute requires to be observed. It is not the case of an imperfect or unfinished or obliterated survey; all was done that it was intended to do; and when the post was placed at the north-east angle of No. 30 at the Adjala road, it was not intended either that a line drawn from thence to the centre of the concession should constitute the whole of the east part of that lot, nor was it intended that all the land east of the concession continued to the Adjala road should constitute one lot, or that 30 chains on the centre line of the concession should define its limit; but it was intended that whatever tract of land was to the east of such centre should be separated by an allowance for road, which, according to such intention, could have been no other road than the allowance previously made on the westerly front, between the lots Nos. 30 and 31. The division between them on the Adjala road could not be determined by equally dividing the distance. It does not form the proper front of either lot, and such a rule could not be applied in relation to other lots and concessions bounded by the Adjala road, as it must be if applicable in this instance. The plan and government grants suppose a corresponding survey on the ground accurately posted and determined, with continuous roads through the concessions; but it is not so; errors or jogs exist still. I find no authority for the commission of other errors in judicial construction in subservience to former errors; whatever is to be accomplished through judicial exposition should be accurately done according to the real intention, not only of the patents, but of the original survey to which they are subordinate. This is not, in my opinion, a case in which there is no alternative but to adopt the distances or quantity supposed in the patent of 1838, all of which are expressed to be "more or less." The first distance of 10 chains calls for the Adjala road, called the allowance of

road on the northern boundary of the township, as the positive boundary. The second calls for the allowance for road, not between the east part as something separate from the west part, but between lots Nos. 30 and 31, not *an* allowance, but *the* allowance, as something defined or existing already, equally with the Adjala road, and as it really was. The only defined and existing allowance was that made on the west front of the concession; and if so made in order to be carried through to the Adjala road, the patent calls for that road so continued. I think that such allowance was originally made with that intention, and that the patent manifestly intends that road as the one therein mentioned, and which was to bound the east part of No. 30 on its upper side. I think no other road or limit between those lots was contemplated or intended to be made either originally or in the patent; so that taking the patent by itself, and applying it, not fancifully, but according to its obvious and undoubted intention, the one road, and no other, is plainly designated and called for as the northern limit of the east part of No. 30. It is not pretended the monuments or posts are lost, or that the allowance for road cannot be traced. The posts that were planted are undisputed, and the allowance can be readily run through. The patent of 1838 professes to grant only the east part of No. 30, being that part which is east of the centre of the concession, and nothing more, and clearly nothing beyond the allowance for road called for as bounding it on that side which is next to No. 31, any more than beyond the Adjala road, which bounds it on another side. The allowance for road so called for by the patent is to be first determined from the original survey and other official sources, not to be ascertained by mere reference to the description contained in the patent. There is only one way to determine it according to the data afforded by the original survey and the plan, field notes and the statute, and when that is done, I can see no alternative but to continue the allowance for road from the west front; and that being done, the limit between Nos. 30 & 31 is ascertained, and the patent should be applied accordingly. So far as relates to

the road allowance in question, it is not a concession surveyed with double fronts. To the extent of the full lots, it was so laid out; beyond that it has a single front only, the plan &c., show that the No. 31, was intended to be a triangular tract with only one front properly so called in reference to the concession lines, not such a figure as the proposed application of the patent of 1838, for the east part of 30 would make it—that is, the west half, a part of No. 31, a four-sided figure, and the east part a triangle, and the whole an irregular figure of five sides instead of three. The shape of the lots as exhibited in the original plan, their supposed quantities, courses, and distances, and the allowance for road indicated thereby, combine to show that the original survey intended to make the allowance for road between those lots a continuous one, from the west side or front through to the Adjala road; and I am not able to perceive any good reason why the original intention should not in this instance, as in others, be fulfilled, or why it should be frustrated in deference to an erroneous placing of the post at the south-east angle of No. 30, and the distances mentioned in the patent, contrary to what is indicated by the sources from which the description given in the patent was taken, and contrary to what I cannot but regard as the clear meaning and intention of the patent itself. It appears to me not only contrary to the real intent and meaning of the patent, but against the design and intention of the original survey and of the provisions of the statute by which the boundaries of lots and concessions, &c., are to be governed. The case of *Badgley v. Bender* (3 U. C. O. S., Q. B.R. 221), appears to me strongly in favor of my view of the case, especially as relates to the only legitimate use which I think may and ought to be made of the government plan or the letters patent.

McLEAN, J., referred to his judgment given in the court below, ante page 84, and concurred with the Chief Justice of the Queen's Bench.

DRAFER, J., also concurred with the Chief Justice of the Queen's Bench.

BURNS, J.,—I have not been able to reduce the difficulties of this case to a mathematical demonstration satisfactory to my own mind, and therefore it is by no means free from doubt that I have formed the opinion I now give, but it is the best I can form under the circumstances of the case.

These difficulties arise not by reason of any disputed facts, because if that were so an end might be made by saying that one believes such or such another state of facts to be the truth ; but these difficulties arise in the application of certain principles, either legal or proper to be applied, as they may strike the minds of different persons. No question can or does exist between the parties as to the application of the statute 12 Vic. ch. 35, to a certain extent. No doubt the plaintiff is right in starting from the ascertained front post between Nos. 30 & 31, on the line between the 6th and 7th concessions, in order to discover what land is comprised within No. 31 ; and the defendant is right in starting from the post between 29 and 30, on the line between the 7th and 8th concessions, in order to ascertain what comprises the east part of No. 30. The township having been surveyed with double fronts to each concession, and these points being indicated by indisputable marks in the original survey upon the ground, place this position beyond dispute. Between lines protracted from these points to the Adjala Road lies the depth of the 7th concession, and consequently these lines are governing limits within the 32nd section of the act. The centre of this concession is not in dispute, and could not be in dispute, for it depends merely upon measurement, and also within the meaning of the 32nd section combined with the 37th section, and is a governing line. There is a road allowance between Nos. 30 and 31, and that allowance is known and marked upon the ground on the front between the 6th and 7th concessions, but is not known or marked upon the ground, and never was intended so to be, on the limit between 30 and 31 upon the Adjala Road.

The plaintiff supports his claim to the land in dispute upon the fact of the allowance for the road being known on the front between the 6th and 7th concessions, and that

in the absence of any proof of a survey upon ground shewing posts planted on the Adjala road, which is not to be treated or considered as the front of the half lot No. 30, he has a right to carry the road straight through from the 6th concession. The difficulty I have in the way of supporting that view of the subject is this: that line considerably passes the centre of the concession, and though the plaintiff's patent grants him No. 31, and of course would give him a right to all the land over the centre, yet according to the statute that line being one run from a post planted in front, on a concession which has been run with double fronts, could not pass the centre, and when the centre was reached, there, according to the statute, the survey of that line must end. The difficulty here is apparent, in the fact as the matter stands, when the survey on the ground is looked at. The posts forming the respective fronts of the half lots of No. 30 and the line between 29 and 30 differ 6 chains, $59\frac{1}{2}$ links, from being opposite each other, and consequently the line of 31 differs the same from what 30 would be if it is to retain its full width on the centre of the concession. If each half lot is to be surveyed from its front post to the centre of the concession, I think it must govern the plaintiff in respect of that line, and he would have no right to cross it in order to determine that part of his land, and for the land east of the centre he must take some other method. The road, of course, is dependant upon that line, and would be governed by it till it reached the centre of the concession. The difficulty then arises, how is the road to be brought from the Adjala line to meet this? The Government plan shews the line to be straight through, but so it does with every other side line and side line road. When the ground is examined it is found the survey there conflicts with the representation on the plan; and the distances given in the defendant's patent, which we must suppose followed the field notes, conflicts with the plan as applied to the actual survey, and the patent itself conflicts with the survey on the ground, because the first distance, instead of being 10 chains to the Adjala road, is 14 chains. If the plaintiff must take some other method of ascertaining where the

road is on the east side of the centre of the concession so as to divide 30 from 31, being the allowance between them, then, is the defendant's method of survey the correct one?

I feel a difficulty in supporting Prosser's survey by applying the statute to it. The defendant's lot is described on the centre of the concession, as being of its proper width, and which by applying it to the survey on the ground, must carry it further north than the plaintiff's southern boundary by 6 chains 59½ links. If this line could be taken as the correct boundary, as surveyed from south to north, I should feel no difficulty in saying that when the surveyor came to the road allowance he could cross it, because if it be imperative under the statute to survey from each end of the lot to the governing point and line in the rear, then if the roads did not meet, it is a difficulty made by the law, and we have nothing to do with that. It would be so with the other lines as shewn, and I do not see any reason why we should apply a different rule because the plaintiff's lot happens to be a triangle, and the defendant's lot one with five sides, than would be applied where the lots and half lots are rectangular. As observed before, the defendant's starting point however is correct, and the statute governs it. From this point to the Adjala road causes no difficulty, but it is at the Adjala road the difficulty arises, in the application of the statute. The western boundary of the township does not form the front of the concession, and no posts being planted along this line, and never intended to be, it is not a case for measurements and dividing of distances according to the act. The provisions of the act are inapplicable to complete the remainder of the survey of the defendant's lot.

According to my view, both plaintiff and defendant must be bound by the operation of the statute, so far as it is and can be applied, but that it does not help either of them out of the difficulty presented here. In that predicament, then, should we resort to the plan in the Government office? I look upon the plan and field notes as subservient to ascertain what the survey upon the ground was, and

whenever that can be ascertained it must govern. Here the plan is not adduced for the purpose of ascertaining what the work on the ground was: we know what it was, it has been proved, and it is not consistent with the plan. It is true no work upon the ground shewed that a post was upon the Adjala road, but all the work on the ground shewing the lines of 30 and 31 to the south, and the field notes describing the distances, for I think it fair to assume the patent taken from that; until the contrary be shewn from that, the work on the ground does not correspond with the plan.

Then we have a case in which a survey cannot be made for either plaintiff or defendant according to the terms and provisions of the act of Parliament, a case in which the actual work upon the ground conflicts with the plans; the field notes taking the description in defendant's patent to correspond with them when applied upon the ground, (which of course they must be when the monuments are there still in order to test them) do not correspond with the plan, but differ from it also. The road reserved was a public highway, and I have no doubt must be considered so, although the crown had never granted Nos. 30 and 31, and persons obstructing it would be liable to be indicted; but then, as in the present case, it would require to be established by law where the road was, and precisely the same difficulty would arise from the work on the ground, the plan, and the field notes returned by the surveyor who originally surveyed the township. It is not the road which governs the boundaries of the lots, and the statute has not made the road the governing boundary; but the allowance being between the two lots, the boundaries of the two lots must be ascertained, and when ascertained, that determines the road. If the statute had made roads the boundary for lots, there might not then have been so much difficulty in carrying the road straight across the centre of the concession to the Adjala road, as the plaintiff contends it should. The lots must be ascertained, and the half lots, when the survey has been made with double fronts, must also be ascertained before it can be determined where the road is, or should be.

Under these circumstances, I see no alternative but to give effect to the defendant's patent according to the courses and distances therein contained, and to say that such quantity of land as is not contained therein up to the Adjala road, making the due allowance for the side line road, belongs to lot No. 31. I only mean this to extend where the statute cannot be applied, for where that can be, it must govern. Prosser's survey was made according to the distances mentioned in the patent; and as the statute cannot govern them, I think this should decide where the road is. No doubt this result was never intended, but it was the result of the act of Parliament, which is as restrictive, in my opinion, as to plaintiff, and prevents him from continuing the southern limit of 31 through from the 6th concession to the Adjala line, as it is inoperative to give both plaintiff and defendant the means of determining the respective boundaries beyond the posts and limits I have already mentioned.

ESTEN, V. C.—The question in this case is one of intention. It is quite certain that the crown could have granted its land, by the patent in question, in any shape or quantity it chose, so long as it did not interfere or clash with previous grants. The intention however, evidenced by this patent, cannot be executed in all its parts, because they are inconsistent with each other; under such circumstances, it is the duty of the court to give effect to the whole instrument, and make every part of it speak as much as possible, and where that is impossible, to sacrifice that which is secondary and unimportant to that which is primary and material. In this case the description first conducts to the Adjala road, then along that road a certain distance, more or less, to a supposed allowance for road, and to within a certain distance, more or less, of the centre of the concession; then along that line a certain distance, more or less, to the south-west angle of the half lot, an undisputed point; then a certain distance, more or less, to the place of beginning. This patent, of course, on the face of it, presents no ambiguity whatever; but when it is attempted to be carried into effect,

the circumstances of the case create much difficulty. It is therefore a case of latent ambiguity; and we are warranted and required to resort to the surrounding circumstances which have created the difficulty, for the purpose of resolving it. The facts which appear, as disclosed by the evidence or admitted by the parties, are, that it is not ten chains from the starting point, as represented by the patent, but fourteen chains to the Adjala road; that no allowance for road can be found; and that the prescribed distance along the Adjala road of 35 chains and 50 links will not conduct to the required distance from the centre of the concession, and will give more than the prescribed width of 30 chains to the lot. It is therefore impossible to carry this description into effect in all its parts, because they are inconsistent with each other; and the question is, which parts we are to retain and which to relinquish—in other words, which parts are primary and material, and which subordinate and ancillary. Mutual admission has freed the case from some of the difficulty which would otherwise be attached to it. It is admitted on all sides that the line from the starting point must be extended to the Adjala road, whatever the distance may be; it is also admitted that the prescribed distance from the terminus on the Adjala road to the centre of the concession is unimportant. The points of the description which remain are, the distance along the Adjala road, the allowance for road, and the width of the lot. It has been mentioned that an actual allowance for road cannot be discovered; this is much to be regretted. The allowance for road is admitted on all hands, to be the cardinal point in the description; to which all other parts, when inconsistent with it, are to yield. The learned Chief Justice of the Common Pleas and Mr. Justice Richards obtained this desired limit by means of a prolongation of the side line in the other part of the concession, and thereby established what is called Walsh's line, affording the smallest quantity of land to the appellant; this method has certainly convenience to recommend it; but it seems to be generally understood, that we can resort to the other part of this concession for guidance in this matter, than to a totally different concession. The re-

sult is, that we have no allowance for road as yet. I apprehend that it is quite certain that one exists, and that it ought to govern this whole description. Obligated, however, as we are, to determine the case in the dark, as to the most material fact in it, we have only to decide between the line along the Adjala road and the rear of the lot. It is admitted that all the lots in the concession were intended to be of the width prescribed for the lot in question, and that if this is not in fact so, it is unintentional, and the effect of mistake. It is quite certain that the crown intended the lot in question to be 30 chains wide. There were three cardinal points in this description; one, that the lot should extend to the Adjala road; another, that it should extend to the allowance for road; and a third, that it should be of the width of 30 chains. The first two were not to be dispensed with; the third was to yield to them if necessary. But the crown had no absolute intention with regard to the distance along the Adjala road; it was prescribed because it was thought that it would carry the lot to the allowance for road, and make it of the required width, and for no other reason. If we sacrifice the width of 30 chains to the distance along the Adjala road, we shall make that which was in its nature ancillary and subordinate prevail over that which was primary and material, and that for no other reason than because it seems first in the description. Upon the same principle, if the surveyor had taken the other course, and had described the rear of the lot before the line on the Adjala road, the opposite construction would have prevailed. But the order or sequence of the description appears to me to be merely accidental; and to furnish no indication of intention whatever. The line along the Adjala road is preferred and made to govern, because it is assumed that the crown intended to make that line of a certain length in the abstract; whereas nothing is more certain than that it did not intend to make that line of any particular length, but only so long as would make the lot 30 chains wide, provided it extended to the allowance for road; in the event which has happened, the description should be read as if it was reversed. The surveyor took the course he did, because he had no doubt

that an allowance for road would be found. Had he known that no allowance for road existed or could be found, he would certainly have taken the opposite course. To reverse the description is not taking too great a liberty, because the order of the description is not essential; and to adhere to it would be to defeat the only part of the intention which we are enabled to execute. This view is strengthened by the fact that the miscalculation of the distance to the Adjala road led to the line along the Adjala road being made longer than it otherwise would have been. I think therefore, that in the absence of an allowance for road, which ought to govern, effect is to be given to the next most material part of the description; namely, the width of the lot, and that the line on the Adjala road ought to terminate at a point which will produce the prescribed width. This construction will, I believe, leave the appellant a trespasser in some degree, and therefore I think the rule for a new trial ought to be affirmed.

SPRAGGE, V. C.—The description contained in the crown patent cannot be literally followed out upon the ground; but taking the description as it is, and comparing it with that portion of the township of Albion in which the land is situated, as that part of the township actually lies, I have endeavored to discover what piece of land is comprised in that description taking it as a question of intention, the intention to be gathered from every course and distance which the description contains. The description appears to me to evidence with sufficient clearness the intention as to two courses and distances being the only two which are not affected by irregularity caused by the Adjala road running diagonally across the upper portion of the lot; and these two, judging from the maps, appear to agree both in bearings and distances with the corresponding sides of the other half lots in the same concession. One of these lines is the line from the front of the half lot to the centre of the concession; the other is the width of the half lot in the centre of the concession. The whole difficulty has arisen from the description assuming the south-easterly angle of the

half lot to be ten chains instead of fourteen chains, as it is, from the Adjala road—that erroneous assumption is the basis of the distance given in the second course in the description; namely, 35 chains 50 links, more or less, to the allowance for road between lots 30 and 31. I agree that if any original monument marking such allowance for road had been discovered, whether at a greater or less distance than that given, it would have governed; but in the absence of that, we are thrown back upon gathering the intention from the whole description. I think it is clear that this second distance is based upon the error in the first, because, drawing a line from the point reached by that distance parallel with the side line of the lot to the centre of the concession, then taking a course down the centre of the concession to a point which is the admitted south-west angle of the half lot, it will give as the breadth of the half lot about the same excess as exists in the first actual distance—that is, from the starting point at the south-east angle to the Adjala road—over the described distance; thus, if the first distance be ten chains, the third will be thirty; the first being in fact fourteen, the third is thereby made thirty-four; if the distance along the Adjala road be implicitly followed. I think it is manifest therefore that the first error is the parent of the second. The inquiry materially suggests itself, to what extent was it intended to run along the Adjala road; and why was 35 chains 50 links named as the distance? I cannot avoid the conclusion, that the sole purpose was to reach a point from which a line drawn to the centre of the concession, parallel with the side line, would be 30 chains from the south-west angle of the half lot; or in other words, to give a lot of the ordinary width; which purpose would have been accomplished if the south east angle had been, as it was supposed to be, ten chains from the Adjala road. The distance along the course of the Adjala road required for that purpose was a matter of mathematical calculation, (not a measurement to reach any known point), and would have been correct if the basis upon which it was made had been correct. With the facts before me, I cannot doubt that if the first distance had been

known to be 14 chains instead of ten, the distance along the Adjala road would have been proportionately shortened; and not doubting this, I could not give effect to the distance along the Adjala road as a governing distance without feeling that I was defeating the intention of the grantor, as gathered from the whole description compared with the first distance on the ground. I have endeavored to test this intention by taking a diagram of the ground with the true distances, and applying to it the description in the patent, but reversing the order in which the different courses are taken: I may be wrong in supposing that this can properly be done, but it seems to me to be immaterial which course be first taken, so as all are taken correctly; and I should have thought that, taking indisputable distances as the basis of the description would have better ensured a correct result. Preserving then the same bearings and distances, and the same starting point, to run first to the centre of the concession; thence northerly along the centre of the concession; then parallel with the first line to the Adjala road; then along the Adjala road to where it intersects the concession line; then along the concession line to the place of beginning: such a description would be strictly correct, except as to the distance along the Adjala road, and from that to the starting point. That along the Adjala road would be plainly immaterial, and would be discarded as secondary and of no real importance; and in the description in the patent, although prior in point of time to the distance along the centre of the concession, it does appear to me to be secondary to that course and distance, and to be a consequence of it, and to be regulated by it, and to have been stated at first what it is, only because the centre line was thirty chains long, and for no other reason whatever. The objection to producing the division line between lots 30 and 31 from the western front, through the easterly half lot, appears to me to be unreasonable. The statute of 1849 provides in effect, that in townships with double fronts the easterly and westerly half lots shall be independent of each other. To produce this line would be to contravene the principle by which the whole survey of the township is

governed, merely because in one lot of a township there may happen to be no easterly point; this point has been commented upon by his lordship the Chief Justice, with whose remarks upon the subject I entirely agree upon the general question; however, I can come to no other conclusion than that which I have expressed.

RICHARDS, J., concurred with the judgment of the Chief Justice of the Common Pleas.

TRINITY TERM, 18 VICTORIA.

Present—THE HON J. B. MACAULAY, C. J.

“ “ A. McLEAN, J.

“ “ WM. B. RICHARDS, J.

JAMES HALL V. WILLIAM IRONS.

New Assignment.—Release.

To a declaration on the common counts for goods sold, &c., defendant pleaded that the causes of action, if any, accrued against defendant and one Swallow, and that after the goods sold &c., and before suit, to-wit, on &c., by indenture made between defendant, then a partner, and for and on behalf of the firm of Swallow and Irons, B. & H., and plaintiff and other creditors of said firm, in consideration of defendant assigning all his goods to B. & H., they agreed to pay the creditors 7s. 6d. in the pound on the amount of their respective claims, as set opposite their respective names in the schedule to said indenture annexed; and that plaintiff did assign to said B. & H., and that they paid to plaintiff 7s. 6d. in the pound; who accepted and received the same in full satisfaction of all debts, and claims, &c., against defendant, from the beginning of the world to the day next before the date of said indenture; with an averment that the causes of action in declaration mentioned accrued in respect of debts &c., in said indenture and schedule mentioned, and before the day next before the date of said indenture. To which plaintiff replied by traversing the averment that the causes of action accrued in respect of debts, &c., in said indenture and schedule mentioned, &c. *Held*, bad on demurrer, on the ground that the plaintiffs should have new assigned.

A release by creditors, to one of two partners, of all actions and causes of actions, suits, debts, &c., which they now have, or ever had, or are entitled to, in respect of any act, matter, or thing, from the beginning of the world, is a release of individual as well as partnership liabilities.

Writ issued on 29th March, 1854; declaration, 13th April, 1854; on the common counts for goods sold and delivered, money lent, money paid by plaintiff for defendant, money received by defendant for use of plaintiff, and on an account stated.

Pleas—First, non assumpsit and issue.

Second, That the claims and causes of action in declaration mentioned, and each and every of them, accrued against defendant and one David Swallow jointly, and not otherwise; and that after the goods sold and delivered, &c., and after the money lent, &c., and after the money paid, &c., and after the money received, &c., and after the account had been stated, &c., as in declaration mentioned, between the plaintiff on the one part, and the defendant and David Swallow on the other part; and before the commencement of this suit, to-wit, on the 9th of July, 1853, by indenture made between defendant, then a partner with said Swallow, and for and on behalf of the said firm of Swallow & Irons of the first part, Bowes and Hall of the second part, and plaintiff and divers other creditors of said firm of Swallow & Irons of the third part, sealed with the seals of plaintiff and defendant, and of the respective parties thereto, and now shewn to the court here, the said Bowes and Hall, with the full consent and approbation of plaintiff and the other creditors of said Swallow & Irons, testified &c., did agree to take from defendant as aforesaid an assignment of all the goods, &c., of defendant and said Swallow, for the considerations in said indenture contained, and to pay the plaintiff and the other creditors of defendant and Swallow, parties to said indenture, a composition of seven shillings and sixpence in the pound, upon the amount of his and their respective claims against said defendant and said Swallow contained in a schedule to said indenture annexed; and that plaintiff and the other creditors, &c., parties to said indenture, then agreed, upon defendant's absolutely as signing the said goods &c., to said Bowes and Hall, to release and discharge in full the said defendant, of and from the said respective claims of plaintiff, and the said other creditors, against defendant and said Swallow, and to accept and receive from said Bowes and Hall the composition aforesaid upon the amount of his and their claims, and in full satisfaction and discharge of the same; and that in pursuance of such agreement, with the full consent and approbation of plaintiff and the creditors, and in consideration of £1,900, then due by defendant

and said Swallow to said Bowes and Hall, and said Bowes and Hall thereupon took and received the same, and paid, or caused to be paid to plaintiff and the other creditors, &c., the full amount of the said compensation upon his and their respective claims, and in full discharge as against said defendant of the same, and of all rights and causes of action against said defendant; and defendant further saith, that the plaintiff and the other creditors, parties to said indenture, then *accepted and received* the said composition in full *discharge and satisfaction* of the same, and of every part thereof, and of all causes and rights of action in respect thereof, against the said defendant. And defendant avers that said causes of action &c., in declaration mentioned, accrued in respect of debts, &c., in the said indenture and schedule mentioned, and before the day next before the date of the said indenture: concluding with a verification.

Third plea—same as last in the introductory part, and that by indenture, &c., as in last plea, Bowes and Hall agreed to take an assignment from defendant, &c., as in last plea, and to pay plaintiff and the other creditors, &c., seven shillings and sixpence in the pound on the amount of his and their respective claims, contained in the schedule to the said indenture annexed, and the said plaintiff and the said other creditors then agreed upon defendant's assigning and delivering over to Bowes and Hall absolutely as aforesaid the said goods &c., to release and discharge in full said defendant, and to accept from said Bowes and Hall the composition aforesaid upon the amount of his and their respective claims; and that in pursuance of such agreement, and with the consent of plaintiff and the said creditors, and in consideration of £1,900, then due by defendant and Swallow to said Bowes and Hall, defendant on the day and year aforesaid, bargained, &c., assigned, &c., to said Bowes and Hall all the goods, &c., as in last plea, and then avers that said causes of action in the declaration mentioned accrued in respect of debts, &c., in the said indenture and schedule mentioned, and before the day next before date of said indenture.

Fourth plea—Inducement as in second and third pleas;

and that plaintiff by said indenture in second plea mentioned, sealed with his seal, of which profert is made, in consideration &c., *remised, released, and quit claimed* the said defendant of and from all, and all manner of actions, and causes of action, suits, debts, &c., whatsoever, at law or in equity, which, against said defendant the said plaintiff then had, or ever had, or was entitled unto, or should or might have claim, challenge, or demand against the said defendant, for or in respect, or by reason or means of any act, matter, cause or thing whatsoever, from the beginning of the world to the day next before the date of said indenture, as by said indenture fully appears; and said defendant avers that the said causes in declaration mentioned, and each and every of them, &c., accrued to plaintiff in respect of debts, transactions, matters and things before the day next before the date of said indenture; concluding with a verification.

Replication—To first plea, *similiter*. To second plea, that the several causes of action in declaration mentioned did not, nor did any or either of them, accrue to plaintiff in respect of the debts, &c., in said indenture, and in said schedule thereto annexed, *modo et forma*: concluding to the country.

Replication to third plea—same as to the second plea.

Demurrer to fourth plea, after setting out on oyer the indenture made the 9th of July, 1853, between William Irons of the town of Guelph, &c., a partner with David Swallow, in the firm of Swallow and Irons, and for and on behalf of said firm of the first part, John George Bowes and John Hall, of the City of Toronto, &c., trading under the firm of Bowes and Hall, of the second part, and the several parties whose names are contained in the schedule thereto annexed, with the amounts respectively due them by said firm of Swallow and Irons, creditors of said firm, &c., of the third part; whereby, after reciting that said Swallow and Irons were indebted to the several parties of the second and third parts in the sums of money respectively set opposite to their names, and that Swallow had fraudulently sold a large portion of the stock of said firm and had absconded, whereby said firm was unable to meet its engagements, and that the stock would not produce a sum

more than sufficient to pay seven shillings and sixpence in the pound, and that Bowes and Hall, being the largest creditors, were willing to pay to the other creditors seven shillings and six pence on their respective debts, taking an assignment of the said goods and chattels, and that said Irons had agreed to assign the said goods and chattles upon being released and discharged in full by the said creditors, it is witnessed that, for the considerations above mentioned, and in consideration of £1,900, then due by said firm to said Bowes and Hall, he, the said William Irons, by and with the consent and approbation of the parties thereto of the third part, did assign, &c., unto said Bowes and Hall, all the goods, debts, &c., belonging, due, or owing to said firm of Swallow and Irons, or to him the said William Irons, his wearing apparel excepted; to hold the same unto said Bowes and Hall, their executors, &c.; and said indenture further witnessed that, in consideration of the premises, they the said several creditors, parties thereto, of the second and third parts, have for themselves *severally* and *respectively* remised, released, and for ever quitted claim, the said William Irons, his heirs, &c., of and from all, and all manner of *actions*, and *causes of action*, *suits*, *debts*, *sum* and *sums of money*, *claims* and *demands* whatsoever, at law or in equity, which against the said William Irons the said creditors *now have, or ever had*, or are *entitled unto*, or shall or may have, claim or demand against him the said William Irons, his heirs, &c., in respect of, or by reason or means of any act, matter, cause or thing from the beginning of the world to the day next before the date of the said indenture. Signed and sealed by the plaintiff, among other creditors, and attached to which is a schedule of the names of the creditors executing the same, with the amount due set opposite their respective names, among which is the plaintiff's name, with the amount due him, £32 9s. 3d., opposite.

The demurrer is on the grounds—First, that the plea does not shew that it is a plea, nor does it contain matter in bar of the causes of action in declaration mentioned, or that the causes of action intended to be released by said indenture are the same with, or include the causes of action

mentioned in the declaration, and that for all that appears or is averred in said fourth plea, the date of the said indenture in said plea mentioned may and might have been prior to the accruing of the said causes of action in said declaration mentioned, and prior to the acts, causes, &c., in respect of which the said causes of action did accrue.

Second, That said plea is argumentative, in this, that it, by merely alleging and setting forth that all causes of action of said plaintiff against said defendant, up to the date of said indenture, were thereby released, only indirectly avers that the causes of action in the declaration mentioned were and are released by said indenture; whereas said plea ought to have expressly averred that the causes of action in the said declaration mentioned were and are, among others, the causes of action thereby released.

Third, That said plea does not present any certain or definite matter, upon which plaintiff could have safely taken issue, and it ought to have expressly averred that the said several causes of action in said declaration, and in the introductory part of the said fourth plea mentioned, did accrue to the plaintiff in respect of transactions, matters and claims, in said indenture and in said schedule mentioned to be by said indenture released.

Fourth, That the release as pleaded, and as set out in said indenture, is *no release in law* of the several causes of action, &c

Demurrer to replication to the second plea, on the grounds: First, that plaintiff should have gone further than merely to have traversed the defendant's second plea, and should have shewn for or in respect of what it is that the said several causes of action in said declaration did occur, if not in respect of the debts, transactions, matters and claims in said indenture set forth and in said schedule mentioned.

Second, That said replication should not have concluded to the country, but with a verification, as defendant is thereby precluded from setting up any defence which he might have in regard to the causes of action, which are

alleged by plaintiff to have accrued, not in respect of the debts, transactions, &c., in said indenture and in said schedule mentioned.

Third, That inasmuch as it appears by the said pleadings that there are two distinct causes of action—one in respect of the debts &c., in said indenture and schedule mentioned; and the other, *not* in respect of the debts &c., in said indenture and schedule mentioned—the plaintiff should have new assigned and shewn in respect of what the causes of action he is seeking to maintain did accrue; whereby defendant would have an opportunity of pleading to the same, which he is now wholly precluded from by the form of the plaintiff's replication.

Demurrer to replication to third plea, same as demurrer to replication to the second.

The demurrers were argued during last term by *Crooks*, A., for plaintiff, and *Smith* for defendant.

MACAULAY, C. J.—The second and third pleas are not demurred to, or objected to on the demurrer to the replications.

The replications thereto appear to me bad. I think the plaintiff should have new assigned. The replications leave the gist of the pleas unanswered, and by denying the identity of the causes of action merely shew by implication that the defendant mistook the plaintiff's intended causes of action, they only deny the identity of the subject matter, and thereby deprive the defendant of the opportunity of answering to the real causes of action, whatever they are. The effect would be that, if upon an issue taken the identity was repelled, the plaintiff's right to recover for his real causes of action would be taken as by default against the defendant, and damages would be assessed against him, because the causes of action were not identical, and not because he admitted the same, for no opportunity is afforded to him to deny or answer thereto. A direct traverse of the pleas would impose upon the defendant the burthen of proving both the release and that the causes of action were released thereby. If admitting the release, and it did release

causes of action, similar in their nature, but different in fact from those intended in the declaration, it seems to constitute a case in which a new assignment is clearly the proper course to be adopted—*Heydon v. Thompson* (1 A. & E. 210), *Wheeler v. Senior* (7 M. & W. 566), *Rogers v. Custance* (1 Q. B. 83), *Moses v. Levy* (4 Q. B. 218), *Aldred v. Constable* (6 Q. B. 370), *Page v. Hatchett* (8 Q. B. 177), *Jubb v. Ellis* (9 Jurist, 1057).

In *Wilkinson v. Lindo* (7 M. & W. 81), a replication, a good deal the converse of the present, was held bad, as being an argumentative denial of the release as pleaded.

Hedges v. Sandon (2 T. R. 439) was very different; the issue there was upon the consideration whether foregoing or not. See also *Moses v. Levy* (4 Q. B. 216), *Freeman v. Crafts* (4 M. & W. 4), *Page v. Hatchett* (8 Q. B. 187), *Rogers v. Custance* (1 Q. B. 77), *Stewart v. Todd, et al.* (9 Q. B. 769), *Lord Bagot v. Williams* (3 B. & C. 235.)

If not objectionable as being an argumentative plea of a release of the causes of action stated in the declaration, I am disposed to think the fourth plea valid. The release being set out on oyer, and the demurrer after profert in the plea, forms in construction of law part of the plea, and the important distinction between deeds set out on oyer after profert, or only stated in the subsequent pleading, where profert is excused, or if made when oyer is not demanded, is explained in *Trott v. Smith* (10 M. & W. 663; S. C. 12 M. & W. 690), *Wilkinson v. Lindo* (7 M. & W. 86), *Hyde v. Watts* (12 M. & W. 260), *North v. Wakefield* (12 Q. B. 536; S. C. 15 Jur. 731).

The distinction is material in the present case, because, if the causes of action accrued within the period of time embraced by the release, the release would *prima facie* be a discharge thereof; and if not set out on oyer, such would be its import until the contrary was shewn by way of replication. But being set out on oyer, the argument is, that as the release forms part of the plea, the defendant should have averred in direct terms that the release did embrace the causes of action mentioned in the declaration, which it has not done.

Apart from the mere question of form, the materiality of such an averment in point of substance depends upon the consideration whether the release does *prima facie* cover all causes of action from the beginning of the world to the day next before the date of such release, whether the causes of action were included in and formed parts of the debt mentioned in the schedule or not, or whether it is by legal construction on the face of it restricted to such schedule debts exclusively.

In the latter event, an averment that the causes of action were identical therewith, or included therein, would be material; in the former it would not; and if the cause of action accrued within the period of time averred by the release, and yet was not thereby released, it would be for the plaintiff to shew by way of reply how it was that it was to be excluded, as was done in *Payler v. Homersham* (4 M. & S. 423), and *Solly v. Forbes* (2 B. & B. 38).

Whether the plaintiff could evade the comprehensive terms and nature of the release by replying special matter, as that the present causes of action accrued against the defendant individually, whereas those released were partnership transactions only, or on any other grounds, it is not necessary to consider; and, notwithstanding the cases in which releases framed in general terms have been restrained to special matters by the recitals, or by the occasion, or by extraneous facts, admissible with a view to the construction of such instruments, I think the release as pleaded does (*prima facie* at least, if not conclusively) cover all causes of action, whether composing the schedule debt or not.

The cases determine that the effect of the release is to be determined according to the intention of the parties as collected from the instrument itself, or under certain circumstances, with the aid of extraneous facts, admissible in determining its construction and legal effect; this will be found to be the principle on which the decisions are based. *Knight v. Cole* (3 Lev. 373; S. C. Carth. 119; S. C. 1 Show. 150; S. C. 5 Mod. 279), *Hence v. Hanson* (1 Lev. 98, 100), *Morris v. Wilford* (2 Lev. 215), *Hutchinson v.*

Savage (2 Lord Ray. 1306), Butcher v. Butcher (1 N. R. 113), Payler v. Homersham (4 M. & S. 423), Simmons v. Johnson (3 B. & Ad. 175), Wilkinson v. Lind (7 M. & W. 86), Solly v. Forbes (2 B. & B. 38), Lembourne v. Cook (1 D. & R. 211; S. C. 5 B. & A. 606), Lanyon v. Davey (11 M. & W. 219), Squire v. Ford (15 Jur. 619; S. C. 9 Hare. 47), Bain v. Cooper (9 M. & W. 701).

And the occasion, purpose, consideration, &c., are only material, as arresting or eliciting the determination of such intention; unless something special restrains the generality of its terms, a release of all demands &c., must be extended to all. Moreover, the peculiar nature and objects of compositions, deeds, &c., are to be borne in mind, not only inter parties, but in relation to the creditors who join therein; considerations which, if not overlooked, are not adverted to in several of the cases in which general releases in such instruments have been limited in operation to the debts mentioned in the schedules. The general force and effect of releases, under seal, and of receipts and acquittances in full of all demands, should also be referred to. Baker v. Dewy (1 B. & C. 706), Rountree v. Jacob (2 Taunt. 141), Cocks v. Nash (9 Bing. 341), Murray v. Earl of Stair (2 B. & C. 88), Lord Bagot v. Williams (3 B. & C. 235), Farrant v. Hutchinson (9 A. & E. 641), Brooks v. Stuart (9 A. & E. 834), Wallace v. Kelsall (7 M. & W. 273), Jones v. Yates (9 B. & C. 532), Thompson v. Tuck (5 C. B. 540), Henderson v. Stobart (5 Ex. R. 99), Tuck v. Tooke (9 B. & C. 437), Margetson v. Aitkin (3 C. & P. 338), Turner v. Hoole (Dow. & Ry. N. P. C. 27), Leager v. Billington (5 C. & P. 456), Wilson v. Ray (10 A. & E. 82), Rosling v. McGurridge (16 M. & W. 181), Gibbons v. Vouillon (8 C. B. 483), Brunskill v. Metcalfe (2 U. C. C. P. R. 431, 450; S. C. 3 ib. 143, 150), Mallalien v. Hodgson (16 Q. B. 689-90).

Now, judging of the instrument, and inferring the intention of the parties from what appears on the face of the instrument, and nothing else does appear, it seems to me that the intention was to release the defendant from all debts and demands (existing up to the day before), as well

individual as partnership, although the recital speaks only of the partnership liabilities, and of assigning the partnership effects, and although recourse is reserved against the defendant's co-partner Swallow, and notwithstanding the recitals specially referring to the partnership debts and effects, and the amounts specified in the schedule, because it also speaks of the amounts claimed by the creditors as being the several amounts set against their names, &c., and of third parties, and the largest creditors, undertaking to pay the composition of seven shillings and sixpence in the pound on the amount of such claims in consideration of receiving an assignment of the partnership effects therein mentioned ; also because the defendant agreed to assign the said goods &c., and so forth, upon being released and discharged in full by the creditors executing the deed, which they on their part were willing to do ; and thereupon for the consideration above contained, &c., the defendant did assign all the goods, wares and merchandise, stock in trade, debts, monies, household furniture, chattels and other personal estate and effects of, belonging, due, and owing to the said firm of Swallow and Irons, or to him the said defendant, his wearing apparel only excepted, wheresoever the same might be, &c.; in consideration whereof, the plaintiff and other creditors released defendant of and from all, and all manner of actions and causes of actions, suits, debts, sum and sums of money, claims and demands whatsoever, at law or in equity, which against defendant they then had, or ever had, or were entitled unto, or should or might have, claim, or demand, against the said defendant, for or in respect of or by reason or means of any act, matter, cause or thing whatsoever, from the beginning of the world to the day next before the date of the instrument ; but which was not to operate as a release to Swallow.

Although the recital speaks only of partnership effects, the assignment includes all the defendant's personal estate in express term ; she thereby transferred all he had, except his wearing apparel, as the consideration for the release ; and to hold that such release extended only to partnership liabilities, and not to individual debts, if any, would it appears to

me, frustrate the intention of the parties and the objects of the creditors who acceded to the composition, and of those who engaged to pay the composition in consideration of the defendant being exonerated in full from all demands on the one hand, as he assigned all his effects on the other.

This view, I consider, best harmonizes with the principles on which deeds of composition are construed and enforced, and more consistent with the real intention of the parties to this deed than limiting it to partnership demands only; in that event, perhaps, we should be bound to hold the plea bad, for not alleging the causes of action to be partnership demands, and not matters personal and individual. In my view of the instrument in reference to the cases taken together, I think the release, *prima facie*, exonerates the defendant. If the causes of action having accrued before the day preceding the release, are nevertheless not covered thereby, I think it lies on the plaintiff to shew how and why that is so, by way of replication; and that it is not incumbent on the defendant to aver that the causes of action mentioned in the declaration, and the debt mentioned in the schedule are identical. I think the release may and does extend to all other demands then existing, if any there were.

There still remains, however, the point of form whether the plea is an argumentative, and not a direct plea of release; the precedent contained in *Hyde v. Watts* (12 M. & W. 254), sanctions the plea as framed: but as respects this point, although the objection was overruled in that case, it was rested on the ground that the release was not set out on oyer, so as to form part of the plea. Park, B. said, "it had been contended the plea was bad because it did not appear by an averment in the plea that the debt was mentioned in the schedule, and that the release, construing it by the recital, applied only to such debts, but that the fallacy was in supposing the deed to form part of the plea, &c."

In that case it was not decided whether the release was tied down to the recital, but the objection was disposed of on the assumption that it was; whereas, in the present case, I think it was not; and this distinction seems to bring it

within the principle on which Hyde v. Watts was decided—namely, that (*prima facie*) the plea was sufficient, and any exception, matter to be replied.

If the plaintiff could in reply have denied that he released the causes of action *modo et forma* alleged, it would shew the plea to be sufficient, and obviate the objection, that as pleaded, the plaintiff must either traverse the release as alleged, or admitting it, deny the accrual of the causes of action before it was executed—in other words, new assign; whereas a direct plea of release traversed would impose upon the defendant the onus of proving both the execution of the instrument of release, and that it embraced the causes of action, whereby he would not be deprived of the advantage of a double replication, as he would be in the other event. But to a direct plea of release of the causes of action, a replication denying the release thereof as alleged, or a replication of *non est factum* would equally require of the defendant proof that a release was executed, and that it embraced the causes of action the effect would be the same. So here, if the plea of release had been direct and general and the replication *non est factum*, the defendant would be obliged to prove a release *prima facie*, including the cause of action, and the release pleaded, if duly proved, would import it; and if in answer thereto the defendant wished to prove that the causes of action accrued since its execution, the objection would be as above made to the second and third pleas, that the plaintiff should have new assigned.

McLEAN, J., and RICHARDS, J., concurred.

Judgment for defendant.

PECK V. MUNRO.

Sale for taxes.

A patent having issued for lot number eight, and three quarters of lot number seven, and the east quarter of number seven being included in such grant, although not returned to the treasurer by the surveyor general as described for grant, and the taxes on the whole of the grant having been paid, which payments the treasurer credited to the *west* three quarters and returned the *east* quarter as in arrear for taxes, upon which it was sold:

Held, that the east quarter could not be sold for arrears, the payments having been made on the part which included the east quarter.

This was an action of ejectment tried before *Richards, J.*, at the spring assizes for 1854, at Cornwall, to recover the east one-fourth part of lot No. seven in the fourth concession of the township of Winchester, in the county of Dundas. Government patent dated 30th of June, 1801, issued to Caleb Peck, of Matilda, yeoman, for lot No. eight, and three-quarters of lot No. seven, in the fourth concession of Winchester.

At the trial a deputy provincial surveyor proved that the three-fourths of No. seven in the patent was the east three-fourths of the lot, and consequently covered the part of the lot for which the action was brought,—the lots in that township numbering from west to east. Evidence was gone into at the trial to shew that plaintiff rightfully claimed the property from the grantee of the crown; but it is not necessary to refer further to that part of the case, as defendant did not move in relation to it.

The clerk in the office of the treasurer of the United Counties of Stormont, Dundas, and Glengary was sworn, and produced the original return for those counties, of lands described for patent from the surveyor-general's office. The portion which relates to the lots in question is as follows :

Lots.	Grantees.	Acres.
5	Crown	200
6	Cornelia Paterson.... D	200
7	{ E. $\frac{1}{4}$ W. $\frac{3}{4}$ }	50
8	} Caleb Peck .. D	350
9	Cornelius Peck D	200
10	Clergy	200
11	Martin Deleback.... D	200

There was a separate account kept by the treasurer for the east quarter of lot number seven, and it was returned as in arrear and sold for taxes. It was admitted that the treasurer's return, the sale and all other preliminary matters relative thereto, were regular. The sheriff's conveyance of the east one-fourth of lot number seven in the fourth con-

cession of Winchester, containing fifty acres, to Alexander McLean, Esq., dated the 8th of April, 1831, was put in, as also the transfer of the same land by McLean to the defendant. The plaintiff contended the east quarter of lot number seven was not liable to be assessed and sold as wild land, inasmuch as it was not in the schedule sent by the surveyor-general to the treasurer described as having been granted or let to lease; and even if it were so returned, and was liable to be rated, it could only be so with the rest of lot number seven and the whole of lot number eight, they having been granted together in the same patent, and that on a sale of a portion of the three hundred and fifty acres to satisfy the arrears due on any part of it, the east quarter of seven could not have been legally sold; for if fifty acres only were to be bid off to satisfy the amount due by the 6 Geo. IV. cap. 7, sec. 13, the land sold ought to be taken from the front angle on that side from whence the lots are numbered, taking a proportion of the width and breadth; but in the present instance there is of the lot as granted one hundred acres, intervening between the fifty acres sold (east quarter) and the western boundary of the three hundred and fifty acres the west side of the lot being that from which the lots in that township are numbered.

The presiding judge suggested that the opinion of the jury should be taken—1st, as to whether the plaintiff had satisfied them that he was entitled to the east quarter of lot number seven, tracing his title from the grantee of the crown. If they found for the plaintiff on that ground, then they should find for him generally, subject to the opinion of the court as to his right to recover, the land having been sold under the circumstances mentioned as being in arrear for taxes. To this the defendant's counsel objected; and, for the purpose of bringing the matter before the court in the most convenient shape, the jury were directed, that if they were of opinion the plaintiff had satisfied them of his right to recover as to the first point, then they should find for him generally, with one shilling damages, which they accordingly did. It was stated at the trial, but neither proved nor denied, that plaintiff had from time to time paid the taxes

on lot number eight and three fourths of lot number seven, by remitting the same from time to time to the treasurer, who applied the amount received for number seven to the payment of the taxes for the west three-quarters, being the portion of the lot returned to his office as described for patent.

In Easter Term last *M. C. Cameron*, on behalf of the defendant, obtained a rule to show cause why the verdict should not be set aside or a new trial granted,—verdict being contrary to law and evidence, and for misdirection. The ground on which the new trial was moved, was, that the east quarter of lot number seven, having been actually granted at the time of the return made by the surveyor-general to the treasurer of the Eastern district, was liable to be sold for arrears of taxes due thereon.

A. McLean shewed cause, and took the same grounds as were put forth by the plaintiff at the trial.

MACAULAY, C. J.—The following cases seem to me to shew that the sale was invalid—*Doe dem. Bell v. Orr* (Hil. T. 7 Wm. IV.), *Doe dem. Upper v. Edwards* (5 U. C. Q. B. R. 594), *Doe dem. Stata v. Smith* (9 ib. 658), *Doe dem. Bell v. Ramnor* (3 O. S. 243), *Doe dem. McGillis v. McDonald* (East. T. 4 Vic.), *How et ux. v. Thompson* (Mich. T. 6 Vic.) In the first place, the east quarter of the lot was not entered or returned in the surveyor-general's schedule as described or granted, and therefore the treasurer was not authorized thereby to take any notice of it. Then, admitting that having been in fact granted, he was entitled to take notice thereof and charge it with the yearly rates, he was on the same principle bound to take notice that the grant which included it was for the east three-quarters, and not the west three-quarters; wherefore the surveyor-general's return was probably erroneous—a fact that might have been readily ascertained by a reference to the surveyor-general's department. Moreover, knowing that the east quarter had been granted as part of the three-quarters of the lot included in the same grant, and the grantee, or those claiming under him, having, so far as we see, paid up the rates on three-quarters of the lot, it was the duty of the

treasurer to have credited such payments to the three-quarters granted, according to the manifest intention of the payor, instead of crediting it to the west three-quarters, one quarter of which he could not have known to have been granted; and then returning the east quarter as in arrear, though not otherwise liable to be taxed within his knowledge, otherwise than as having been granted in a government patent, including the whole of number eight and three-quarters of number seven, upon the whole of which grant the taxes had been paid. I see nothing to indicate that they were paid, or intended to be paid, on the west three-quarters, except the erroneous return of the surveyor-general, of which, from all that appears, the payor may have been entirely ignorant. The payments must have been with a view to the grant; and if the grant was noticed by the treasurer as indicating the east quarter, and so far overruling or correcting the surveyor-general's return, he should equally have noticed that the taxes were paid on the east three-quarters and not the west three-quarters; in short, he should in his account have corrected the surveyor-general's error (if the west quarter was not under grant), and have substituted west quarter for east quarter as the portion exempted. Had he done so, it would have followed that the east quarter would not have been in arrear or liable to be sold.

As it is, the east quarter has been sold for non-payment of rates, because the payments made have been credited to the west quarter, which was not liable to rates, although the payments were intended to apply to the east and not the west quarter.

McLEAN, J., concurred.

RICHARDS, J.—The stat. 33 Geo. III. cap. 3, passed in 1793, requires the assessors to make a return of every inhabitant householder possessed of *real or personal property residing within* the parish or *township*, and to divide them into classes; then a certain sum annually was imposed on the persons placed in each class respectively.

In default of payment of the rate, the same was to be levied under a warrant of a justice of the peace, by distress

and sale of the goods and chattels of the person neglecting to pay. This statute, with one amending it as to the mode of regulating the classifying of the inhabitants, continued in force until 1803, when it was repealed as to most of its provisions. At the same time the stat. 43 Geo. III. cap. 12, was passed. Section 2 defines the *kinds* of *real* and *personal* property which shall be deemed *ratable*, and the amount at which they shall be rated; and, amongst other things, mentions every acre of arable meadow or orchard land *one pound*, every acre of uncultivated land *one shilling*; and by a provision nothing therein contained should extend to any property, goods, &c., which should belong to or be in possession of his majesty. Sec. 3. Assessor to demand from each *inhabitant* resident a list of all *ratable* property, real and personal, in his possession. Sec. 6 directs inhabitants having *ratable property* in different townships and in different districts to give in a list thereof to the assessor of the township wherein he shall reside; the collector whereof shall collect the same, and having paid the rate shall not be liable to pay again in any other township or district. The provisions of 33 Geo. III. cap. 3, as to collection of rates, are declared to be in force. In sec. 10 there is a provision that nothing therein should extend to the uncultivated lands of infants under twenty-one years, or any married woman. This statute continued in force until 1807, when 47 Geo. III. cap. 7, repealing all former acts, was passed. In declaring and fixing the value of *ratable* real and personal property, amongst other things it provides that every acre of *cultivated* land shall be rated at 20s. and every acre of uncultivated land 2s., with a similar proviso as contained in the previous act as to property of the crown. Sec. 3. Assessors to demand from every *resident inhabitant* a list of all *ratable* property, real and personal, in his possession *in the province*. Sec. 4 *provides* that all *lands* shall be considered as *ratable* which are holden in fee simple, or a promise of a fee simple, by land board certificate, order of council, or certificate of any governor of Canada. Sec. 7 provides for collection of rates by distress similar to 33 Geo. III. cap. 3, sec. 23. Sec. 9, amongst

other things, imposes a penalty on persons refusing to deliver a list of ratable property, or wilfully misstating the same. This act continued in force until 1811, when it was repealed by 51 Geo. III. cap. 8. Sec. 2 provides as, to *ratable* property, real and personal, amongst other things, as follows: every acre of arable, pasture, meadow or land shall, after the first Monday in March 1812, be rated *at twenty shillings*, every acre of uncultivated land *at four shillings*, with a proviso as to exemption of property of the crown from taxation similar to the last act, with this exception—"except lands and tenements in the possession of the lessees of the crown and clergy reserves, which shall be liable to the same rates and assessments as other lands therein mentioned." It then makes the same provision as to the parties who shall give in a list of ratable property, the kind of property to be included in the list (that is, all the ratable property in his possession in the province), and the person to whom the rates shall be payable. Sec. 8 provides for collection of rates by sale of the goods and chattels of the party assessed. This act continued in force until 1815, when it was amended and continued by 55 Geo. III. cap. 5, for four years from the 1st of March, 1816. Sections 4 and 5 require that the *district* in which the real property shall be situate shall be mentioned in the list of *ratable* property to be furnished the assessor by each ratable resident inhabitant. Sec. 7. The clerk of the peace was to furnish the clerk of the peace of other districts with a certified copy of the list of lands lying in their districts returned on their assessment rolls; and by sec. 9, after the 1st of March, 1816, the treasurer was to make out a return of the sums levied on *real* property not within their districts, which sums, after deducting certain expenses, the magistrates were to order to be paid over to the treasurer of the district wherein such real property shall be situate. This act continued in force until 1819, when by 59 Geo. III. cap. 7, after the 1st day of January, 1820, it was repealed. By this latter act the ratable value of every acre of arable, pasture, or meadow land continued to be *twenty shillings*, and every acre of uncultivated land *four shillings*. The property of

the king continued exempted from taxation, except the crown and clergy reserves actually leased to individuals, which should be liable to the same rates and assessments as other lands thereinbefore mentioned. By sec. 3, which was in force when the lot in question was sold, the assessor was to demand from every ratable inhabitant within his township a list of all ratable personal property in his possession *in the province*, and of all lands or other real estate in his possession within the township, specifying the number of the lots and concessions, or otherwise particularly describing the same, and the number of acres cultivated and uncultivated in each lot or parcel of ground, and the assessors to make a return of all the ratable inhabitants, with a true list of all their ratable property, specifying the particulars above mentioned. Sec. 4 declares all lands considered ratable property which were held in fee simple, or promise of a fee simple, by land-board certificate, order of council, or certificate of any governor of Canada, or by lease. Sec. 10 authorises the seizure and sale of goods and chattels of persons neglecting to pay taxes. Sec. 12 directs the surveyor-general, on or before the 1st of July, 1820, to furnish the treasurer of each district with a list or schedule of the lots in every township in his district as the same are designated by numbers and concessions, or otherwise upon the original plan thereof, in which list it shall be specified in columns opposite to each lot respectively to whom the said lot, or any and what part thereof, has been described as granted by his majesty, and whether the same, or any and what part thereof, be yet ungranted; and also what lots are reserved as crown or clergy reserves, or for other public purposes, and to whom such reserves, or any and what part thereof, have been leased by his majesty; and shall, on or before the 1st day of July in each year thereafter, transmit to the treasurer of such district respectively a schedule of all such lots or parcels of land, specifying the number of acres or other less quantity of land in each as have been set to lease by his majesty since the last schedule by him furnished as before directed. Sec. 13 declares that all lands described in the schedule as having

been granted or let to ease by his majesty shall from the time they are returned in the schedule be assessed and charged to the payment of rates or taxes in the respective districts in which they are situated, and not elsewhere, whether the same be occupied at the time of assessment or not; and the treasurers were authorised to receive such taxes. By sec. 14 the treasurer of every district shall keep an account for every township, &c., within his district according to the list or schedule furnished by the surveyor-general, in which he shall particularly enumerate every lot or parcel of land in the township, &c., *describing the same* as in the *schedule*, and shall charge the same with or credit it for the amount of the taxes and rates payable or paid in respect for each and every year. By 6 Geo. IV. cap. 7 (1825), as amended—Sec. 6. Treasurers shall at Quarter Sessions first held after the 1st of July, 1829, present an accurate account of all lands upon which assessments shall have been in arrear for eight years, specifying the lot by number, concession, or otherwise, as appears in the schedule furnished the treasurer, and the amount due for assessments thereon, and shall discharge a similar duty in every year thereafter. Sec. 7. On such accounts so to be made and rendered, the clerk of the peace to make out a warrant to the sheriff (form given in schedule) to make the amount therein mentioned, with fees, &c., by sale of such portion of lands as may be necessary, if there is no distress on the lands. The schedule recites that by the account rendered by the treasurer to the justices certain assessments imposed upon land, according to law, are in arrear beyond eight years.

It is very obvious that since the passing of the statute of 1819 the legislature contemplated a change in the mode of collecting the assessments on real property where the owner did not reside within the township where the real property was situate; for by the previous enactments he was to furnish the assessor with a list of all his real and personal property within the *province*, whilst by the above act he was to furnish the list of the *personal property* within the *province*, and of the *real property* within the *township* only. By the former acts, then, the only remedy was by distress

and sale of the goods and chattels of the person assessed, and the act of 1819 allowed the collector for the time being to collect the rates which might accrue on any unoccupied land after the time they were returned in the schedule of the surveyor-general, whenever any distress might be found on such land, by the sale of such distress, in the same manner as if occupied by the person then in possession when the assessments became due. Then, by 6 Geo. IV. cap. 7, provision is made for the sale of such lands as shall have been in arrear for eight years, and the warrant to authorise such sale is based upon the account of the treasurer shewing the lands on which assessments shall have been so in arrear, specifying the lot or parcel, &c., by the number, concession, or otherwise *as appears in the schedule furnished the treasurer.*

It therefore appears to me that the return from the surveyor-general furnishes the basis on which the treasurer must keep his account, and he can only properly return such lands as in arrear for taxes as appear in the schedule of the surveyor-general as described as granted or set to lease. It is very evident that the east quarter of lot number seven in the schedule of the surveyor-general appears to be *ungranted*; and although the same having been actually patented would be liable to taxes if the owner lived within the township, yet according to the proper interpretation of the statute, and according to the spirit of the decisions of the court under it, as referred to in the judgment of the Chief Justice, it appears to me the lot was not liable to be sold for taxes; and the verdict for the plaintiff must therefore stand, and the rule for setting aside the verdict must be discharged.

Rule discharged.

MARSHALL V. THE SCHOOL TRUSTEES OF SCHOOL SECTION
NUMBER ELEVEN, TOWNSHIP OF KITLEY.

Corporation—Seal when necessary.

The Trustees of a School Section being a corporation under the statute 13 & 14 Vic., c. 48, are not liable to pay for a school-house erected for and accepted by them, not having contracted for the erection of the same under seal.

[Macaulay, C. J., *dissentiente*.]

ASSUMPSIT.—1st count, special agreement to erect a school-house, not stated to be in writing or under seal.

2nd count, common counts, including work, labor and materials.

Pleas.—1st. Non-assumpsit. 2nd to first count—that plaintiff did not erect school-house. 3rd. Payment. 4th. Set off.

At the trial the plaintiff put in by consent the copy of a written agreement not sealed, signed by plaintiff and two of three persons, McLean and Livingston, the trustees, dated 7th June, 1851. It is the specifications of a school-house in School Section Number Eleven, on a site, specified to be built of stone and lime mortar, twenty-six by thirty-six feet—walls twenty inches thick, eleven feet high, roofed—floor one and a half inch pine, &c., mentioning doors, windows, &c., to be seated similar to the Addison School-house and not to cost more, to be erected on or before the 1st December, 1851, for ninety-seven pounds, to be paid as follows :—Fifty pounds payable on the first January, 1852, and forty-seven pounds on the first of January, 1853, if completed according to specifications, &c. He also proved that he erected a school-house on the ground pointed out, and gave general evidence of performance, though not by the time specified, but in the course of the ensuing winter; a receipt was put in for plaintiff, dated 8th January, 1851 (*quære* 1852), for fifty-pounds, from the trustees of School Section Number Eleven of Kitley, being the first payment towards the erecting of the school-house built in said section.

There was evidence that the school-house was occupied the fore part of the next summer for the purposes of the school of the section, and so occupied most of the time since. Some disagreement arose about the seats and desks, but they seem at length to have been completed, though

not of materials equal to the Addison School. It was proved that funds had been raised and paid over to the treasurer sufficient to pay the plaintiff for the work. Defendants' counsel objected that the defendants not having contracted under seal were not liable, and leave was reserved to move a nonsuit on this ground. The evidence was in some points conflicting, and the fact of acceptance was disputed, the trustees giving evidence to shew it was occupied by plaintiff's consent, without compromising their right to object to the non-completion and insufficiency of the work. Verdict for plaintiff, £37 17s. 6d.

In the following term (Easter, June, 1854), *Richards*, for defendants, obtained a rule upon the plaintiff to shew cause why such verdict should not be set aside and a new trial be had between the parties, on the ground that the defendants are not liable to an action at law, not having become bound under seal; or to arrest judgment, on the ground that the first count is bad, the defendants not being liable on a parol contract as therein set forth.

Sherwood shewed cause during this term; he contended that the plaintiff having built the house, and defendants having accepted it, the action well lies on the second count, though no sealed undertaking exists.—*Church v. Imperial Gas Co.*, 6 A. & E. 846; *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829; *Diggles v. Railroad Co.*, 5 Ex. R. 442; *Smith v. Hull Glass Co.*, 19 L. J. C. B.; *Clarke v. Guardians*, 21 L. J. Ex. 349 and S. C. 16 Ju. 686; *Finlay v. Robeson*, 7 Ex. R. 409; *Turley v. Grafton Road Company*, 8 U. C. Q. B. R. 581; *Ritchie v. Montreal Bank*, 4 U. C. Q. B. R. 459; *Quinn v. School Trustees*, 7 U. C. Q. B. R. 130; *Blue v. Toronto Water Co.*, 6 U. C. Q. B. R. 174; provincial statute 13 & 14 Vic., ch. 48, sec. 12, No. 4 to 16; *Clarke v. The Gore Mechanics' Institute*, 12 U. C. Q. B. R. 178.

Richards, in reply, relied upon the authorities as conclusive in defendants' favor when carefully examined, and contended that the act incorporating defendants said nothing to dispense with the use of the seal, in contracts like the present, as some acts do when intended; and referred to the general act, 12 Vic., ch. 10, sec. 5; and that

in the absence of a sealed undertaking the case failed, although the defendants have occupied the building, which they necessarily did as being erected on the school site. He cited and commented upon the following cases in support of his argument :—The Mayor of Ludlow v. Charlton, 6 M. & W. 815; Arnold v. Mayor of Poole, 4 M. & G. 893; Lamprell v. The Ballericay Union, 3 Ex. R. 283; Diggles v. Railroad Co., 5 Ex. R. 442; Finlay v. Robeson, 7 Ex. R. 410; 20 L. J. Ex. 193. As militating against him, he mentioned and remarked upon Reg. v. Inhabitants of Acton, 8 Q. B. 810; Lamprell v. The Ballericay Union, 3 Ex. R. 307; Blue v. Toronto Water Co., 6 U. C. Q. B. R. 174; and the elaborate review of the cases by Mr. Justice Draper in Clarke v. The Gore Mechanics' Institute, in which he differed from the other learned judges. He said it had been decided that no difference existed between contracts executory and executed, and that in both instances alike a seal was necessary to prove the work done at the defendants' request and on their account. He also submitted that the verdict being general judgment should at all events be arrested, because, even if the second count could be sustained, the first was clearly bad, as shewing on the face of it, that the plaintiff is suing on a parol executory contract, not binding in law upon the defendants.

MACAULAY, C. J.—It must be taken on this application that the jury have found that the plaintiff erected the school-house on defendants' land, and that defendants have since taken possession thereof, and availed themselves of the benefit of his work and outlay upon their property. If not, or if the evidence did not warrant such a finding, the defendants might have applied to set aside the verdict on such reasons. But the application has been made on the broader ground, that, admitting the work to have been done in the manner and at the time it was done, and to have been accepted or taken possession of and used by the defendants in the state it was, still the defendants are not liable, because they did not contract under seal.

Of the legal liability of a corporation to pay, when the consideration has been executed at their request, and the

benefit accepted and retained, I have on former occasions expressed my views. In several cases I have said I thought the corporation liable. It is now said there is no substantial distinction between contracts or considerations executed or executory, or between promises express or implied by law; that no express promise or binding executory contract can be made by a corporation except by seal, unless in small matters, or under peculiar circumstances; and that the law will not imply a promise by a corporation upon a consideration executed, among other reasons, because to raise such implied promise the execution of whatever was done must be proved to have been performed at the request of the corporation, which request could only be legally proved by their seal. Admitting that while executory, or when the plaintiff can only sue or recover on the special contract when executed, a corporation can only be bound by a sealed covenant or agreement (unless in the excepted cases)—it does not follow that when a contract not under seal has been executed on the plaintiff's part, or a sealed one has been deviated from or not performed in due time, or strictly in all respects, the plaintiff is without remedy, unless one may exist in a court of equity. When first pronounced, I thought the implied legal liability resulting from an executed consideration a proposition well-founded in law and reason, and I cannot yet perceive that it is not so. In such cases the liability arises from acts done by the corporation, and that for acts done through their servants or agents corporations may become liable in case or trespass for torts, is a well-established rule. In such cases the proof does not consist of mere undertakings apart from acts, but of facts whence a liability or promise implied by law as distinguished from a promise or agreement expressed.

The one may well require to be shown in writing under seal, while the other depends not on muniments, but on acts and facts established.

Against this it is urged that to support debt or an action on the case on promises, a request to execute must be shown under seal; and that from a sealed request to perform

work, &c. the law would imply a covenant to pay therefor. It appears to me it may be answered that a request is a matter of fact, which fact may be proved expressly or inferred from other facts; and that acceptance and enjoyment of the fruits of the plaintiff's labor constitutes evidence from whence a previous request may be inferred.—Star. Evidence, part 4, page 93; 1 Sand. 264, note 1. On this principle it seems to me the evidence of the members of the defendants' corporation being proved to have taken the benefit of the plaintiff's work (and not that they repudiated it) warranted the inference that it was done at their request in their corporate capacity—that is, at the defendants' request—their entry and possession being the defendants' entry and possession. Then, as to the distinction in the books between little things, or things to be often repeated and graver or greater things, I have never been able to discover any principle in it, unless it be to establish that there is no inflexible rule against a corporation being bound unless by seal; and if so, it becomes a question of degree, or a question under any peculiar circumstances that may arise; and when, in a great matter, the fact is proved to demonstration or beyond all reasonable doubt, as clearly as could be done in a smaller matter, it appears to me the first principles of justice demand the application of a similar rule *a fortiori*. It may be said this cannot be done by mere entries or writings, not confirmed by the seal, on technical grounds; but that cannot be urged in face of well-established facts and acts done, whence (and not from writings) inferences are to be drawn. The question always is, did the corporation do the acts? did it bind itself by such acts? After all, whether to commit torts or execute agreements, it can only act through agents; and the seal, when affixed to any contract, must be so affixed by some person duly authorised on behalf of the corporation. In this case, the trustees being duly elected, acquired authority in law to use the seal of the corporation, if there is one; the same trustees, that is, the members of the corporation acting as such, took possession of and used the school-house erected by the plaintiff on their grounds.

I have heretofore expressed my opinion of the liability of a corporation under such circumstances, and the recent case of *Clarke v. The Gore Mechanics' Institute* in the Q. B. (June, 1854) is so much in point that I feel authorised in relying upon it, and in thus holding, until a court of appeal shall determine the views I entertain to be erroneous. In my opinion, therefore, the rule should be discharged. As to arresting judgment the verdict may be restricted to the second count under the evidence.—See *Davis v. Grand River Navigation Co.* (M. T. 2 U. C. Q. B.), *Kingston Marine Railway Co. v. Phillips* (M. T. 3 V. U. C. Q. B.), *Dempsey v. The City of Toronto* (1 U. C. Q. B. R. 1), *Raines v. Credit Harbor Co.* (1 U. C. Q. B. R. 174), *Blue v. Toronto Gas and Water Co.* (6 U. C. Q. B. R. 174), *Quin v. School Trustees* (7 U. C. Q. B. R. 130), *Turley v. Grafton Road Co.* (8 U. C. Q. B. R. 581), *Hamilton v. Niagara Dock Co.* (2 U. C. Q. B.), *Worthington v. Municipality of Haldimand* (10 U. C. Q. B. R. 217, 10 U. C. R. 720), *Ritchie v. Montreal Bank* (4 U. C. Q. B. R. 459.)

McLEAN, J.—The first count of the declaration is on a special agreement for the building of a school-house within the defendants' school section, to be twenty-six feet by thirty-six feet in size, and according to certain specifications therein set forth, to be completed in a good and workmanlike manner—(no time is specified for its completion)—in consideration whereof the defendants undertook and promised the plaintiff to pay him, when completed, according to the specifications, the sum of ninety-seven pounds—as follows, fifty pounds on the 1st January then next (1852), and forty-seven pounds on the 1st January, 1853. The plaintiff then avers that he built the school-house and finished it, according to the specifications, in a good and workmanlike manner, and that the defendants, on the 1st January, 1852, accepted and received the same from the plaintiff, and paid him the said sum of fifty pounds, and have since then held and enjoyed the said school-house for the purposes of a school-house, within the said school section, and thereupon afterwards, on the 1st January, 1853, became liable to pay to the plaintiff the said sum of forty-seven pounds, according to the said agreement, &c.

2nd count—for work and labor by the plaintiff in and about the business of the defendants, for them and at their request, and for divers materials and other necessary things found and provided by the plaintiff and used and applied at the request of the defendants in and about that work, and labor.

Then follow the usual money counts—for money paid to the defendants' use—for goods sold and delivered, money had and received, money due on an account stated, and for interest.

Pleas—1st. Non-assumpsit.

2nd. That the plaintiff did not finish the school-house in the manner and form in the declaration alleged.

3rd. Payment to the plaintiff of money (£1300), in full satisfaction and discharge of all the plaintiff's causes and rights of action.

4th. To all the other counts—set-off. Issues on these pleas.

This case was tried at the last Brockville assizes, and a verdict was rendered for the plaintiff and £37 17s. 6d. damages.

On the trial, a copy of an instrument, purporting to be specifications of a school-house, to be erected in school section number eleven, on a piece of ground selected by the trustees for that purpose. At the foot of the specifications is an agreement, signed by the plaintiff, to erect or cause to be erected, the school-house above specified, on or before the first day of December then next (1851), for the sum of ninety-seven pounds currency, in sums as follow—fifty pounds currency, payable on the first day of January next (1852), and forty-seven pounds currency, payable on the first day of January, 1853, "providing the said house be completed according to the specifications." This instrument, not under seal, bears date at Kitley, 7th June, 1851, and is signed by the plaintiff, as contractor, and by Alexander McLean and Duncan Livingston, trustees.

From the evidence adduced on both sides, it was quite clear that the building was not completed within the time

specified, nor according to the terms of the specifications, so that the plaintiff could not recover on the instrument mentioned in the first count as an agreement, even had it been under the seals of the parties and executed as required by law. The plaintiff must therefore depend wholly on his count for work and labor and materials—and, unless that is sustainable, must necessarily fail.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit, on the ground that the action is brought against them as a corporation, and that as such they can only contract under their corporate seal. Leave was reserved to the defendants to move to enter a nonsuit, if the court should be of opinion, under the evidence, that the plaintiff is not entitled to recover in this action. During Easter Term, a rule *nisi* was obtained, calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside and a nonsuit entered, pursuant to leave reserved, or why the verdict should not be set aside and a new trial had between the parties, on the ground that the verdict is against law and evidence and for misdirection—or why the judgment should not be arrested. Cause was shewn during the following term.

By the 13th and 14th Vic. ch. 48, sec. 10, the trustees in each school section shall be a corporation, under a particular name, and by sec. 12, sub-sec. No. 3, the trustees are to take possession and have the custody and safe-keeping of all common school property, and to acquire and hold, as a corporation, by any title whatsoever, any land, moveable property, moneys or income for common school purposes—and by the 4th sub-section the trustees are authorised to do whatever they may think expedient with regard to the building, repairing, renting, warming, furnishing and keeping in order the section school-house and its appendages. The mode of providing for the salary of a teacher and other expenses of a school, is prescribed by the 7th sub-section—and by the 16th sub-section, it is declared to be the duty of trustees to exercise all the *corporate* powers vested in them by the act for the fulfilment of any *contract* or *agreement* made by them, and in case any of the

trustees shall wilfully neglect or refuse to exercise such powers, he or they shall be personally responsible for the fulfilment of such contract or agreement.

It is shewn by the evidence, that the trustees did in this case exercise their corporate powers in causing to be raised from the inhabitants within their section such an amount as would be sufficient to enable them to fulfil their engagement or agreement with the plaintiff; but the agreement not having been fulfilled on the part of the plaintiff, and the value of the work done by plaintiff being a matter of controversy, nothing has been paid to him except the first instalment of £50; and as the school house was to have been completed, but was not so completed by the 1st December, 1851, the plaintiff does not seem to have been in a position to demand even the first instalment. The building does not seem to have been accepted from the plaintiff as completed under the agreement; but being in want of a house in which to keep the school, by plaintiff's consent they took possession during the summer of 1852, under an understanding that they were to leave it whenever plaintiff should require it, in order to complete it. He did subsequently put in seats or forms, and did some other work, but the whole work is so far inferior to what the plaintiff stipulated for, that the trustees who have since succeeded from time to time to the charge of the school are unwilling to make any further payment, though the full amount has been raised to defray the cost originally contemplated. The jury have found that the plaintiff's work and materials were worth £37 17s. 6d. more than what he has received, and that fact being found in his favor, I should be unwilling to disturb the verdict if it can be sustained on legal grounds. There is no doubt that the defendants were acting within the proper scope of their duties as a corporation in procuring a school house to be built within their section; and as the building which has been erected, however the first possession may have been obtained, continues to be enjoyed by the inhabitants of the section for school purposes and is undoubtedly the property of the trustees, the plaintiff ought to recover the amount to which he is fairly entitled beyond

the £50 which he has received. Still, when he sues for that amount, as for work and labor performed, materials found by him for the defendants and at their request, the question arises was there any legal and binding contract, under which he can recover. It is generally admitted that a corporation aggregate is not bound unless by contract under its corporate seal, except in matters of frequent or daily occurrence and of small amount, in which to hold it necessary to affix the common seal would be seriously to impede the corporation in fulfilling the very purposes for which it may have been created. These exceptions arise from necessity, and strictly speaking are a departure from the rigid rules of law, to facilitate as far as possible the working in ordinary matters of corporate bodies. It may be difficult sometimes to fix a limit to which the relaxation from the rule may be carried—but it will scarcely be contended that the case of the plaintiff is one of those coming within the exceptions as a matter of frequent occurrence or of small amount. If not, then the contract, to be binding on the defendants, should have been under the corporate seal, and in such case it could be enforced on either side. The defendants could have sued the plaintiff for failing to fulfil his contract within the time and in the manner stated in the specifications, and the plaintiff, had he completed his contract according to his terms, could sue the defendants for the consideration to be paid to him. He could not, however, waive his contract and sue for work and labor when the building remained in an unfinished state, though the defendants might have taken possession and held it for the purposes of their school. No implied promise would arise against a corporation as against an individual to pay for work and labor of which the inhabitants of a school section enjoyed the benefit, and not merely the inhabitants composing for the time being the corporation. If then, the contract could not be waived in such a case, on the ground that it must form the only basis of a decision between the parties, I am at a loss to see how a party can recover in a case like the present, where there is in fact no contract at all. The agreement to build a school house in a

particular manner was, when entered into, executory ; and it is admitted in all the reported cases that, if not a matter of daily occurrence, or small amount, it required at that time the corporate seal to make it binding on the parties. If either party had chosen to recede from it, there would have been no remedy for the other on an agreement which in law was *nudum pactum*. Then the half performance of such an agreement could not make the contract more binding, and the imperfect performance would still leave it in the same state. But in such a case it is alleged—and I am aware it has been recently decided (*a*)—that there would be an executed consideration of which the defendants would receive the benefit, and that they must be estopped from saying that they are not bound to pay for such benefit by reason of there being no contract under their corporate seal. It appears, however, to me almost absurd to hold that a body which cannot contract except from absolute necessity, and that only in matters of frequent or daily occurrence, and of small amount, unless under seal, shall nevertheless be held responsible for sums of large amount on a supposed legal contract which may have been executed in whole or in part. It appears undoubtedly very reasonable that where services have been rendered for a corporation of which they or the public enjoy the advantage, the individual who has rendered such services should be paid for them—but when such payment is attempted to be enforced at law, a valid contract must be shewn from which a promise to pay will arise ; and in the case of a corporation, such a contract requires a seal to render it valid—such a contract must be assumed to enable a party to recover even for an executed consideration. I am not prepared to admit that in matters involving large interests, and amongst others the erection of houses for corporations, though necessary for the purposes of such corporations, there can be any distinction held between executory and executed contracts to enable a party to recover in the one case who could not in the other. If the plaintiff is entitled to recover in this case, it must be on an assumed legal contract. If

(*a*) 12 U. C. Q. B. R., 178.

such contract had existed, it is shewn that he has not performed it, and his case is precisely like the case of *Lamprell v. The Bellericay Union* (3 Exchr. 283), in which the plaintiff claimed to recover as upon a *quantum meruit* for work done beyond what was expressed in the contract, though upon the subject matter of the contract, but the court held that he could not maintain his action for the extras.

All the cases (and some of the decisions are certainly conflicting) are commented upon in the able judgment of Mr. Justice Draper in the case of *Clarke v. The Hamilton and Gore Mechanics' Institute*, and I confess that in my estimation that judgment contains an unanswerable argument against the present action. I regret exceedingly that I am obliged to entertain opinions at variance with the decision in that case, as it tends to render the state of the law uncertain and unsettled, in a matter of very great importance. It appears to be equally unsettled in England, different views being taken by different courts, and seems to require legislative interference. If the legislature deem it proper to allow corporations to be sued on contracts not entered into under seal, it will be very easy to pass an enactment for that purpose ; but so long as a corporation can only act or contract through its seal in any important matters, I must hold that a seal is essential to the validity of any contract on which a corporation may sue or be sued.

There are now so many corporations for various purposes, and the proceedings of some of them probably not very regularly conducted, that it is most desirable that all who have dealings with them should know on what footing their contracts rest—and that may be done by a legislative enactment or by an appeal to the highest tribunal in the province.

RICHARDS, J.—The liability of a corporation to be sued in an action of assumpsit on an implied contract for an executed consideration has been so recently and ably discussed in the Court of Queen's Bench in this province, in the case of *Clarke v. The Hamilton and Gore District Mechanics' Institute*, that I do not consider it necessary to say much more on the subject than to refer to that case, and

the authorities there collected. Mr. Justice Draper has collected and considered the decisions in the English courts on the subject down to the latest period in which the proceedings of those courts are reported, and quotes the observations of Baron Parke in giving judgment in the case of *Finlay v. The Bristol and Exeter Railway Company* (7 Ex. 409, Hilary Term, 1852), as follows: "The cases in which corporations can bind themselves without seal are reduced to these—*First*, when there is a parliamentary charter shewing an intention that the corporation should be bound by contracts of a particular description though not under seal. The other cases are the ancient common law exceptions, which are simply confined to orders given by a corporation with a head such as the appointment of a servant and small matters of that description, upon which an action lay for wages, although the appointment was not under seal. No case has gone the length of saying that a corporation may bind itself by a contract not under seal, which does not range within either the small services excepted by the common law or contracts authorized by parliamentary charter."

It is not pretended that this case falls within any of the exceptions referred to; and it is very clear that the building of a school-house for the school section, which would not be necessary to be done oftener than once or twice in half a century, is one of the most important acts that can be done by corporations established for the same purposes as the defendants are, and that such contracts can only be binding when under seal, if any contracts are necessary to be under seal to bind a corporation. I am therefore of opinion this action will not lie, and that the rule in this cause should be made absolute. Baron Rolfe, in pronouncing judgment in *Mayor of Ludlow v. Charlton* (6 M. & W. 823), as to the propriety of the rule requiring that corporations shall only contract by seal, remarks as follows: "Before dismissing this case we feel ourselves called upon to say that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a

merely technical character, or which it would be safe to relax except in cases warranted by the principles to which we have already adverted. The seal is required as authenticating the concurrence of the whole body corporate. If the legislature in erecting a body corporate invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

In 2 Kent's Com., 289, it is said, "At last, after a full review of all the authorities, the old technical rule was condemned as impolitic and essentially discarded, for it was decided by the Supreme Court of the United States in the case of the Bank of Columbia v. Patterson (7 Cranch. 299) that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution all parol contracts made by its authorized agents were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the

enforcement of which an action lay." In this country, studded as it is with municipal and trading corporations, and where the legislature has given great facilities for the establishment of these bodies, "it may be of great convenience almost amounting to necessity," that the decision arrived at in the Supreme Court of the United States, and to some extent approved of by the Court of Queen's Bench here, should be a law in this province, and if it should be so decided, either by the Court of Appeals or the legislature, I am far from being certain that it would not be most convenient and advantageous; but consider we are bound by the authority of the cases decided in England, and until the law is settled differently, we must carry it out in the mode indicated by those decisions..

Rule absolute.

LEWIS GRIEVE V. THE ONTARIO AND ST. LAWRENCE
STEAMBOAT COMPANY.

Negligence.

In an action for negligence against the owners of a steamboat, for injuries sustained by the plaintiff in consequence of one of the fenders having broke loose from the steamboat while in the act of leaving a wharf, and striking and injuring the plaintiff, who was standing on the wharf, and it appearing that the plaintiff had received warning to stand clear of the fenders, and that a person with ordinary care might have escaped,—the court set aside a verdict for plaintiff and granted a new trial on payment of costs. MACAULAY, C. J., *dissentiente*.

Case for negligence. Declaration states that defendants, on the 18th day of June, 1852, were possessed of a certain steamboat called the Niagara, then floating and being in the River St. Lawrence, at and near a certain wharf in the town of Brockville, on which wharf the plaintiff was lawfully standing and being, near the said steamboat; that it was *the duty* of the defendants to have *the fenders* of the *said steamboat well and surely secured and fastened*.

Yet defendants, not regarding their duty in that behalf, then negligently and carelessly suffered and permitted one of the said fenders to be so insufficiently secured and fastened that the same then broke away and struck the plaintiff, then lawfully standing and being upon the said wharf and near to the said steamboat, and knocked him down, and thereby one of the arms of said plaintiff became

and was grievously maimed and wounded; and plaintiff was otherwise greatly wounded, bruised and injured, and also by means of the premises was sick, sore, lame and disordered, and so remained and continued for a long time, to wit, hitherto; during all which time plaintiff suffered and endured great pain, and lost the use of his said arm, and was hindered and prevented from transacting and attending to his necessary and lawful affairs, and lost and was deprived of divers gains, profits and advantages, which he might, and otherwise would have derived and acquired; and thereby plaintiff was forced and obliged to and did then pay, lay out and expend divers monies, in and about endeavouring to be cured, &c.,—to the damage of plaintiff, &c.

Pleas—Not guilty; and defendants not possessed; the possession, however, being at the trial admitted.

The cause was tried before Mr. *Justice Richards*, at the last assizes at Brockville, when it appeared that the defendants' steam vessel Niagara, in backing out from a wharf at Brockville, on which plaintiff and others were standing, broke the fastenings of one of the fenders on the starboard side, abaft the wheel-house, and the fender struck the plaintiff on the shoulder, and injured him so badly that he has lost the use of his arm. The defendants relied on two grounds of defence. First, that notice had been given to all on the wharf to stand clear of the fenders. Second, and that it was a mere accident, without any default on defendants' part. The boat had just started, and put back to take in some baggage, and was backing out a second time. It seemed that the fender was used as a lever to throw out the vessel, after back way had been given to her by the play of the engine reversed. That the waters of the River St. Lawrence were higher than usual, wherefore the strain was increased by reason of the increased distance between the gunwale or side of the boat and the wharf, against which the lower end of the fender pressed, and the effect was that the iron key which fastened the top of the fender to a bolt in the upper deck drew out or broke, being insufficient to bear the pressure on it, and the fender (a

round spar or piece of timber several feet long) was thrown on to the wharf, and struck the plaintiff in its fall, he being twelve or fifteen feet from the vessel at the time. The plaintiff contended the top of the fender was not sufficiently secured. Witnesses for defendants stated that it was a usual and the best mode of securing it, and that if made stronger the effect would be to tear away the upper deck—that is, if the swivel or key bolt did not yield first. It would seem, therefore, that the fastening might have been stronger, and was not strong enough to tear up the plank of the upper deck, nor to resist the pressure thrown upon it, but that the key failed as stated, upon a sudden pressure coming against the fender, probably more than usual. Being left to the jury, they found for the plaintiff for £387 10s., which defendants move to set aside, as against law and evidence, and for misdirection, or to arrest judgment for insufficiency in the declaration.

In the following term (Easter Term, 17th Vic.) *Richards*, for defendants, obtained a rule upon the plaintiff to show cause why such verdict should not be set aside, &c., as being against law and evidence, and for misdirection, or to arrest judgment, the declaration not stating facts, whence the duty alleged therein, or the negligence imputed to the defendants, could be inferred.

Eccles showed cause in Trinity Term, 18 Vic., and contended there was sufficient evidence to go to the jury in support of the declaration, which was perfectly good, as showing a plain duty on the defendants well and sufficiently to secure the fenders of a vessel owned and navigated by them, and a default therein equivalent to negligence express; and that having been left to the jury they found for the plaintiff, on evidence (though conflicting in some particulars), quite sufficient to warrant the finding in plaintiff's favour, that he had been grievously injured by reason of the defendants' mismanaging the vessel, or insufficiently securing a dangerous fitting used in fending her from wharves: that there was a want of due precaution on one ground or the other, and that the verdict should not therefore be disturbed.

Richards, in reply, submitted the principle of the action

was case for negligence in the performance of a duty ; that the evidence neither established a duty or a breach of duty that will sustain such an action. Moreover, that the plaintiff was proved to have been himself in fault, not having regarded the warning given to him to keep clear of the fenders ; and being himself to blame, to a material degree, he cannot recover in an action in which it is necessary to establish the whole fault against the defendants : that in point of fact, the fender was well and sufficiently secured, according to the usual fittings adopted in steam vessels of that class, and that its giving was a pure accident, for which no blame is justly imputable to the defendants. The mere failure of the bolt did not of itself show negligence, and there was no other proof thereof. He distinguished this from cases of coach-owners, or others carrying for hire, when the duty is incurred by reason of the contract, and that all persons owning and navigating steam vessels do not insure persons against all possible accidents. That the declaration is bad, not showing that the defendants were using the vessel, or what force applied thereto caused the fall of the fender, whereby plaintiff was injured ; that it does not show all the fault in defendants, or indeed any fault, at the time of the accident, or that plaintiff was altogether faultless, as it should : that the imputed negligence is misdescribed : that it is not alleged defendants, being in the act of using the vessel, overstrained the fender by carelessness or mismanagement, whereby it fell and struck the plaintiff ; that alleging possession merely was insufficient, and the declaration should have gone further and alleged that defendants were using the steam vessel, in order to render the allegations and proof consistent.

MACAULAY, C. J.—The first question is whether there was evidence to go to the jury. On referring to the following authorities : Aldridge v. Great W. Railway Co. (3 M. & G. 515), Hewitt v. O. S. & H. R. R. Co. (11 U. C. Q. B. R. 604), Skinner v. London B. & S. Coast R. W. (15 Jur. 299), Tucker v. Chaplin (2 C. & K. 730, 3 C. & K. 81), Piggot v. Eastern Counties R. W. Co. (3 C. B. 229), Thorogood v. Bryan (8 C. B. 116), Rich v. Basterfield (4 C. B. 784),

Hancock v. York M. & B. R. W. Co. (10 C. B. 348), Blake v. Midland Railway Co. (21 L. J. C. B. 233, 2 Eng. Rep. 360), Carpue v. London & Brighton Railway Co. (5 Q. B. 747), Dawson v. Chamney (5 Q. B. 165), Clayards v. Dethick (12 Q. B. 439), Greenland v. Chaplin (5 Ex R. 233), Oliphant on Horses (157), Welch v. Lawrence (2 Chitty R. 262), Cotterill v. Starkey (8 C. & P. 693), Illidge v. Goodwin (5 C. & P. 190), Lynch v. Nurden (1 Q. B. 33 and 29), Jones v. Boyce (1 Star. 493), Christie v. Griggs (2 Camp. 80), Sharp v. Grey (9 Big. 457), McKenzie v. McLeod (10 Bing. 385), Dixon v. Bell (5 M. & Sel. 198), Templeman v. Haydon (12 C. B. 507), Willoughby v. Horridge (12 C. B. 742), it seems to me that the fact itself constituted some evidence of negligence. It shewed either that the fender was insufficiently secured for the work it was to do, or that without anything in the weather, currents, or other sudden casualty, or a *vis major*, beyond the defendant's controul to account for it, the fender was overstrained beyond its capacity to bear the force, by the acts of the defendants' servants in managing the vessel, as respected the pressure of steam, the use of the helm, or otherwise. It is not like railroad cases, authorized by and running under acts of parliament; it is the case of a steamboat company managing their steam vessel their own way, and using their own property in such a way that injury was thereby caused to the plaintiff; and I cannot find that such injury is justified or excused by the fact that the defendants' servants, by their own voluntary acts, suddenly threw a greater pressure on the fender than it was capable of bearing, whereby it sprung loose and struck the plaintiff, while standing on the wharf, where, for all that appears, he had a legal right to be. Whether he heard the warning to stand clear or not, and if he did, whether he wilfully disregarded it, were questions for a jury; the case of Tucker v. Chaplin (2 C. & K. 730), is in point on this head. That the use of such fenders or levers, however common in steam vessels, was dangerous, owing to the great pressure cast upon them, was well known; and it behoved the defendants to secure them accordingly. If they relied upon the insufficient fastening, it was for the jury to say whether

they were culpably negligent in the premises or not; and having found that they were so in this case, I cannot say that on the evidence I see sufficient grounds for setting it aside, as against law or evidence; nor do I think there was any misdirection of which the defendants can complain, in the way it was left to the jury. As to arresting judgment, I think the duty charged upon the defendants clearly resulted from the fact of their being possessed of the steam vessel under the circumstances alleged. It was the duty of those possessing or owning her, and possession imports ownership, to have the fenders safely and surely secured and fastened. Second; such being their duty, it is alleged that they negligently and carelessly suffered one of such fenders to be so insufficiently secured and fastened that the vessel floating and being near a certain wharf, the fender broke away and knocked plaintiff down, &c., he being lawfully on the wharf, and near said steamboat; whether the vessel was in actual use or not, or lying still moored at the wharf or not, or how it happened that the fender broke away at the moment it did, is not stated; but that it was insufficiently secured, and that the defendants negligently suffered it so to remain until and at the time when the jury have affirmed it to be so by their verdict, and if so whether it fell by its own weight or by reason of the vessel in pressing upon the wharf by the action of the water, or whether she was in actual use and impelled to the wharf by the acts of defendants' servants on board of her, in the course of navigating her, would make no difference as respects the defendants' liability and legal responsibility. It would much resemble the case of *Kinney, administratrix, v. Morley*, in this court (U. C. C. P. R. 226). It is not alleged that the defendants knowingly suffered; but if material to have been proved, that would be presumed after verdict; if not material to have been proved, it need not be presumed; but still the alleged negligence is found, and all must be presumed to have been proved essential to establish that charge.

McLEAN, J.—The declaration alleges that the defendants were possessed of a certain steamboat, at a wharf in the town of Brockville, on which the plaintiff was lawfully

standing and being near to the said steamboat; that it was the *duty* of the defendants to have *the fenders* of the said steamboat *safely* and *surely secured* and *fastened*, yet that defendants, not regarding their *duty* in that behalf, then *negligently* and *carelessly suffered* and *permitted* one of the said fenders to be so insufficiently secured and fastened that the same then broke away and struck the plaintiff, while standing on the said wharf, and knocked him down, &c. The declaration does not state that there were any fenders on board of defendants' boat, except by implication, nor does it state for what purposes fenders are used by steamboats; it merely alleges a certain duty in the defendants in having the fenders properly secured and fastened, and that the defendants *negligently* and *carelessly* suffered and permitted *one* of the fenders to be so insufficiently secured and fastened that it broke away and struck the plaintiff, without showing how it broke away, or the cause of it, or that the defendants or their servants were in any way instrumental in causing it to break away. For aught that appears on the face of the declaration, the fender may have broken away from some cause wholly beyond the control of the defendants and without any default in the construction or the use of the fender, or in the working of the boat. The *negligently* and *carelessly* permitting a fender to be *insufficiently secured* and *fastened* is the only ground of action; and unless the *negligence* and *carelessness* complained of be established by evidence, the plaintiff cannot recover. Now the fastening of the fender may have been quite sufficiently secure for ordinary and usual purposes, but insufficient to meet extraordinary or very unusual purposes; and the working of the boat in an improper manner might cause a fender to give way which had been secured in the most effectual and sufficient manner which human skill could contrive. In such a case the improper and negligent working of the boat, and not the imperfect fastening of the fender, would undoubtedly form the ground of action, unless it is to be assumed that owners of steam or other vessels are bound to have everything belonging to their vessels in such a state as to make it *impossible* that

an injury to an individual from the breaking of any part can arise. In such case the utmost possible care on the part of the owners in procuring the best workmen and the best materials, and in having their work done in the most approved and substantial manner, could not shield the owners from the consequences of an action for *negligence* in a case like the present; and the mere circumstance of an injury arising to an individual from the breaking of anything on board of a vessel must necessarily be taken as sufficient proof to establish such negligence. Now if it be "necessary to shew some carelessness on the part of the defendants, or to lay facts before the jury, so that it can be inferred," as laid down by Tindal, C. J., in the case of *Aldridge v. the Great Western Railway Company* (3 M. & Gr. 528), it follows, I think, that the mere occurrence of an injury such as the plaintiff complains of cannot be regarded as a conclusive proof against the defendants. In the case of *Christie v. Griggs* (2 Camp. 79,) the breaking down of the defendant's coach, in which plaintiff was a passenger, was considered as *prima facie* evidence of negligence; and in this case, admitting that it was the duty of the defendants to use all care to have the fenders of their boats so secured as to do no injury to individuals, the breaking away of the fender, as it appears to me, could only be considered as establishing a *prima facie* case of negligence; and so it seems to have been considered by my brother Richards at the trial.—*Skinner v. London Brighton and South Coast Railway Company* (2 English Rep. 360, S. C. 15 Jur. 269.) Regarding it in that light, it was undoubtedly competent for the defendants to meet the charge of negligence and carelessness on their part, with testimony such as they adduced to shew that the fender which unfortunately broke away was secured in the most approved manner, and with a fastening made of the best description of iron; that all the fenders were such as are used in the best description of boats, and secured in the manner usual in such boats, and that, in fact, the defendants, instead of being negligent and careless, have always used every diligence to have their boats well found and manned, and managed. Of course it

was for the jury to decide between the evidence establishing a *prima facie* case for the plaintiff and that adduced by the defendants to rebut it, and they seem to have considered that the mere fact of the fender having, under unusual pressure, given way, afforded conclusive proof of negligence on the part of the defendants in securing the fender, and they rendered a verdict accordingly. In the case of *Christie v. Griggs*, to which I have referred, Sir James Mansfield held that if the axletree of defendant's coach, which broke and caused the injury to plaintiff, was sound, as far as human eye could discover, the defendant was not liable. If that direction to the jury was correct and well founded in law, then it is strongly in point in this case, and the defendants ought not to be held responsible if the fender which gave way "was sound, as far as human eye could discover," as it undoubtedly was.

In the case, however, of *Sharp v. Grey* (9 Bing. 458), which was an action like that of *Christie v. Griggs*, by a passenger against the proprietor of a coach, for injury received by the coach breaking down, it was shown that it broke down in consequence of a defect in that part of the iron axletree which was encased in wood and had not been examined by the proprietor, and the verdict of £500 damages was not disturbed by the court. The defect in that case was manifest when the breaking took place. And, moreover, that was an action of *assumpsit* against a coach proprietor and common carrier for failing in his *contract* to carry the *plaintiff safely*, and the defendant was bound to have a safe vehicle for the purpose.

In the case of *Hewitt v. The Ontario Simcoe and Huron Railway Union Company* (11 U. C. Q. B. R. 605), a verdict was rendered for the plaintiff, and £170 damages, in an action charging the defendants, through their servants, with having so negligently, carelessly and improperly, managed, conducted and directed a steam carriage and engine, containing fire and igneous matter, along the railroad, near the plaintiff's timber, that by such carelessness, negligence, and improper conduct, divers sparks of fire passed and flew out from the steam car-

riage and engine amongst the plaintiff's timber, by means whereof the plaintiff's timber became ignited, and was destroyed. It was shewn on the trial that the fire was caused by the engine, but that all usual and proper precautions had been used in the construction and management of it. The defendants moved for a new trial, and the court there held that on the evidence adduced as to the precautions used in securing the flue or pipe of the engine against the escape of the sparks of fire, the defendants should have had a verdict, and they granted a new trial. In that case the defendants had used all reasonable precautions, but an injury had nevertheless been occasioned to the plaintiff by the sparks escaping from their engine setting fire to his timber; having used such precautions, they were held not responsible. So in this case, the defendants, having used all the precaution which skilful workmen and persons accustomed to the working of such fenders deemed necessary and proper, ought not to be held responsible as for negligence and carelessness in securing the fastenings of the fenders. From the circumstance of such fenders being in general use on board of steamboats, it must be assumed that they are essential and necessary for the proper working of vessels of that description, and all that can or ought to be required of proprietors is, that they should use every reasonable and proper care in having such fenders sufficiently secured. They cannot, in ordinary cases, be very competent judges of the strength of the chains used in securing the fenders, and must rely upon skilful workmen to make them sufficient. If, after every reasonable care had been exercised in the selection of iron, and in the construction of such work, the owners were still liable for every injury which could possibly arise, they could not guard themselves against suits arising from accidental breakages, with respect to which no negligence could be imputed to them. It is quite true that in cases of injuries arising to travellers by carriages on land the owners are held responsible in such cases; but then that liability arises from an implied contract to carry safely, and the owners are bound to furnish sufficient carriages

for the purpose. If this action were for an injury received on board of the defendants' boat while being carried as a passenger, the cases would be similar, but it cannot be said that there was any contract between the plaintiff and defendants; and while it is admitted that they are bound to use all reasonable precautions to prevent accidents to persons standing on the wharves at which the boats may touch, they cannot be regarded as *insuring* such persons against the occurrence of such accidents.

There is further ground on which, as it appears to me, this case should be submitted to another jury, and that is, that some of the plaintiff's witnesses, and several on the part of the defence, gave evidence, which was not impeached, that before the accident, and just as the boat began to back, the persons on the wharf were repeatedly warned to "keep clear of the fenders." A witness of plaintiff's, who was standing between the plaintiff and the boat, hearing the alarm and the cracking of the fender, moved away and escaped it; and the same witness stated that when he did so he called out to those near him to take care of the fenders. Another of plaintiff's witnesses also stated that he was standing near plaintiff when the fender began to crack, and that he jumped away, and on looking round found that it had fallen on plaintiff,—and he added, that "he did not think a person who stands near a fender and is struck with it exercises ordinary caution." (a)

It is well established that one who sustains an injury cannot maintain an action against the party causing such injury if it be shewn that it was caused by negligence on the part of the injured, or that it might have been avoided by the exercise of reasonable care on his part. Now it is strongly impressed on my mind by the evidence that the plaintiff's own want of care and negligence in not attending to the warnings which he received from the boat and from those about him to stand clear of the fenders, was by no means blameless, and ought to have weighed very materially with the jury in deciding the merits of the case.

(a) Thorogood v. Bryan 8, C. B. 116; Catlin v. Hill, 3 M. & W. 244.

When those in conversation with plaintiff heard these warnings and attended to them, by removing to a safe distance, it is not too much to presume that plaintiff must have heard them also, and that with equal care he too might have escaped from the fender when it fell. On the ground, therefore, that the negligence charged against the defendants is rebutted by the evidence adduced by them, and that the plaintiff's own testimony, as well as that of the defendants, shows that plaintiff did not act with reasonable care and prudence when warned to avoid the fenders, I think that a new trial should be granted, on payment of costs.

RICHARDS, J.—At the trial in this cause there were two points to be left to the jury. First, was the fender which caused the injury to the plaintiff properly secured? Secondly, could the plaintiff, by the exercise of ordinary care, have avoided the injury? Both these points were undoubtedly for the jury to decide upon. As, however, there was conflicting evidence on both points, it seems to me that the case may properly be submitted to the consideration of another jury, although they found for the plaintiff at the trial. The damages are considerable, and the questions arising of great importance to those engaged in the business carried on by the defendants. New trials have been granted in some of the cases in England referred to, and in others they have been refused. It is very probable another jury will find in the same way, and perhaps even increase the amount of damages. Should that be the case the court would hardly feel it necessary to interpose by granting a new trial a second time. If the defendants are advised that it would be for their interest to have the facts submitted to the consideration of another jury, I think they should be at liberty to do so on payment of costs.

The case of *Butterfield v. Forrester* (11 East 60), lays down the principle that one who receives an injury from the negligent act of another, shall not have an action if by the exercise of ordinary care he might have avoided the injury. This doctrine is confirmed in numerous cases.—*Woolf v. Beard* (8 C. & P. 373), *Hawkins v. Cooper* (Ib.

473), *Drew v. New River Co.* (6 C. & P. 754), *Marriote v. Stanley* (1 M. & 568 853), *Clayards v. Dethick et al.* 12 Q. B. 439), *Thorogood v. Bryan* (8 C. B. 121.)

As to the other point see *Skinner v. London & Brighton Railway Co.* (15 Jurist 299), *Templeman v. Haydon* (12 C. B. 507), where on proof of collision under circumstances which might not amount to negligence, it was held plaintiff could not be non-suited.

Rule absolute for new trial, on payment of costs.

THOMPSON V. NELLES.

Caveat emptor, when applicable.

Plaintiff, a merchant, having delivered cloth, &c. to be made up into coats to a tailor who made up cloth &c. for plaintiff and others, and was also in the habit of exhibiting for sale and selling clothes on his own account, and he having sold the coats made of plaintiff's cloth to defendant, *Held*, that plaintiff was entitled to recover the coats from defendant, and that the maxim of *caveat emptor* applied.

Replevin for two overcoats bought by defendant of one Cunard, a tailor at Cayuga. Plea—1st, *non-detinet*; 2nd, plaintiff not possessed. The plaintiff, a merchant there, used to entrust Cunard with cloth and trimmings to make up clothes for him to sell at his retail store. There was evidence that Cunard kept a small stock of his own of ready made clothes for sale, and was in the habit of selling them, and that he also made up clothes for others besides the plaintiff, for some of which he was paid in cloth to be made use of by himself. The defendant apparently purchased these coats *bona fide*, and the plaintiff's case rested upon the claim that they were made of his materials and for him, and were his property; that Cunard had no authority to sell them, express or implied, and that the maxim of *caveat emptor* applied. The defendant disputed the identity of the cloth &c., and contended that, engaged in business and of the trade that Cunard was, an implied power so to dispose to strangers ought to be inferred. Being left to the jury, they found for the defendant.

Martin, for plaintiff, obtained a rule on defendant to

show cause why a new trial should not be granted for misdirection, and as being against law and evidence.

Dr. Connor, Q.C., showed cause, and contended, that considering Cunard's trade and business, the plaintiff by intrusting him with the cloth &c., gave him implied power to dispose of the coats when made; that both parties being innocent, the loss should rather fall upon plaintiff, who enabled Cunard to impose upon defendant, than upon the latter, the plaintiff having intrusted the materials to Cunard, who became as to a stranger the ostensible owner, and that the case was left to the jury in terms rather too unfavorable to the defendant as to his knowledge of Cunard being a vendor as well as maker of clothes; that the verdict was not against law, and the evidence was for the jury, and that it was too trifling a matter to be sent to a second trial.—*Manton v. Moore*, 7 T. R. 70; *Gunn v. Gillespie*, 2 U. C. Q. B. R. 151; *Pickering v. Busk*, 15 East. 38; *Dyer v. Pearson*, 3 B. & C. 38.

Martin, in reply, submitted that, though small in point of value, the suit was for the coats themselves and not damages for their conversion; and being brought within the inferior jurisdiction, the objection to a new trial because of small value ought not to prevail; that there was misdirection, because on the evidence the jury should have been told to find for the plaintiff, instead of its being left to them as it was; that the facts do not present even a questionable case of implied authority or assent to the alleged sale to the defendant, nor show that the plaintiff's conduct should conclude him from objecting to the sale; that the maxim of *caveat emptor* applied; that the defendant was bound to look to his vendor if his title was invalid, and was not entitled to retain the plaintiff's goods, he being perfectly innocent and free from any imputation that could legally or fairly compromise his right of property; that there was no reasonable doubt of the identity of the cloth and materials, and therefore the rule should be made absolute, referring to *Boyd v. Skiffin*, 2 Camp. 325; *Loeschman v. Macline*, 2 Star. 311; *McCombie v. Davies*, 6 East. 538 & 40; *Boyson v. Coles*, 6 M. & S. 14; *Williams*

v. Barton, 3 Bing. 139; Dyer v. Pearson, 3 B. & C. 38; Cairns v. Robins, 8 M. & W. 265, and note; Barnett v. Brandao, 6 M. & G. 667; 1 Smith's Leading Cases, 258 and note.

MACAULAY, C. J.—This is certainly a trifling matter in point of value, but I have not been able to satisfy myself that the ruling of the learned judge who tried the cause, or the way he left it to the jury, was in strict accordance with what I take to be the correct rule of law on the subject, that is, assuming the identity to have been proved; though there was some slight conflict of evidence on that point, I think the weight of evidence strongly in plaintiff's favor. Assuming, then, the identity of the cloth, &c., the coats were *prima facie* the plaintiff's property; and the authorities do not seem to me to warrant us in holding, that because a tailor by trade who both makes up cloth and materials into wearing apparel, and exhibits for sale and sells ready made clothes, is intrusted with cloth and materials in the way of his trade, he can, by wrongfully selling the garments when made up, confer a good title upon the purchasers. The maxim *caveat emptor* is applicable; he takes only such title as the vendor had to confer, and the owner is not to be deprived of his property unless it could be made further to appear that his conduct in the premises was equivalent to an implied authority to such tailor so to dispose of the things; and, not considering that on the evidence in this case any such authority, expressed or implied, could be justly inferred, or the plaintiff be held to have given the tailor a disposing power over the coats, which the defendant alleges him to have exercised, I think there should be a new trial without costs.

MCLEAN, J., and RICHARDS, J., concurred.

Rule absolute for new trial.

LEWIS MOFFATT V. JOHN M. GROVER.

Registration—Husband and wife.

A mortgage by husband and wife of the wife's lands having been registered without any acknowledgment of the wife of her willingness to part with her estate, as required by the statute, and the sheriff having after such mortgage and registration thereof sold and conveyed the husband's interest in the lands under a *fi. fa.*, and the deed to the purchaser was registered after the re-execution of the mortgage and the due acknowledgment by the wife, which mortgage, however, was not re-registered after such re-execution and acknowledgment.

Held, that the interest of the husband in the land passed to the purchaser under the sheriff's deed, to the exclusion of the mortgagee.

The interest of a husband in the freehold estate of his wife may be sold under a *fi. fa.* against lands.

Ejectment for the north half of lot number twenty-one in the fourth concession, township of Cramahe.

It was admitted at the trial, before Mr. Justice McLean, that James Perry was seised in fee in right of his wife Emily Jane Perry who owned the land, but whether he was tenant by the curtesy or not did not appear; that a writ of *Fieri Facias*, tested the 8th October, 12 Victoria, 1848, at the suit of Ebenezer Perry and George Perry, was issued and delivered to the sheriff of, &c., against the lands and tenements of said James Perry, for £54 14s. 1d., which writ was in the sheriff's hands before and at the time the mortgage next mentioned was executed; that on the 8th day of October 1849, by indenture between James Perry and wife of the one part, and William Beattie of the other part, the said *party* of the first part, in consideration of £100, did give, grant, bargain, sell, alien, assign, transfer, release, enfeoff, convey and confirm unto the said party of the second part the said north half of twenty-one in the fourth concession of Cramahe, together with all the estate, right, title, &c. of *them* the said party of the first part; to hold in fee; provided that if the party of the first part, *their* heirs, &c., should pay, &c., £100, with interest at six per cent., on or before the 1st October 1853, then to be void, with covenants, &c., and a clause for the mortgagors retaining possession until default, &c. Executed by the two parties of the first part in presence of two subscribing witnesses. Registered the 13th October 1849.

On the 23rd November 1849, Mr. Sheriff Ruttan, by deed poll reciting the above mentioned *Fi. Fa.* and sale of

the above mentioned half lot with other lands, on the 17th November 1849, to John M. Grover (defendant) for £64 2s. 9d., conveyed to him all the estate, right, title and interest which said James Perry of right had of, in, and to the said lands, &c., habendum to said Grover in fee as fully and absolutely as the said Henry Ruttan as sheriff as afore-said could or ought to grant, bargain and sell the same, by force of the statute in that behalf and the said writ of *Fi. Fa.* or otherwise. Registered 8th April, 1850.

On the 1st April 1850 James Perry and wife re-executed the indenture of mortgage of the 8th October 1849, in presence of one witness, and on the same day a certificate was endorsed, signed by two justices of the peace, that on that day the within mortgage was duly executed in their presence by Emily Jane Perry, wife of James Perry, one of the mortgagors therein named, and that she being examined by them apart from her husband at the said time and place, appeared to give her consent to depart with her estate in the lands mentioned therein freely and voluntarily, and without coercion or fear of coercion on the part of her husband or of any other person or persons whatsoever; but it was *not* registered again.

On the 21st September 1850 said James Perry and wife executed to defendant for £50 an indenture per statute, whereby they released to him and heirs, in fee, the said half lot, certified to have been acknowledged by her on the same day before two justices of the peace in the same terms as the indorsement on the mortgage. Registered 10th October 1850.

By deed poll annexed to the mortgage, Wm. Beattie, the mortgagee, on the 31st May 1853, in consideration of £100, assigned, transferred and set over to Lewis Moffatt (plaintiff) all his right, title and interest in and to the said indenture of mortgage, and all his interest and estate of and in the lands, &c. therein described, &c., and the monies secured thereby, &c., to hold in fee according to the nature thereof, with power to enforce, collect, &c. Not registered.

The question made at the trial was, whether the mort-

gage could prevail over the sheriff's deed and the release to defendant under the facts above stated.

The jury found for the defendant, with leave to plaintiff to move, &c.

Accordingly in the following term, Easter, 17 Vic., *Vankoughnet, Q. C.*, obtained a rule on behalf of the plaintiff, calling on the defendant to shew cause why the verdict should not be entered for the plaintiff.

Cameron, Q. C., shewed cause during the following term, and contended that though the mortgage from Perry and wife to Beattie was invalid because it was not duly acknowledged, still that being registered, it was the sufficient registration of a deed affecting the land to bring the registry laws into operation; and that not having been re-registered again after re-execution and due acknowledgment, the registration of subsequent conveyances took precedence, and that defendant's was the better title and should prevail against plaintiff's.

Vankoughnet, in reply, submitted that if the mortgage was void to pass any estate or interest, the registration of a void deed was equally void; and if so no prior registration appeared, nor anything to shew that when re-executed it did not pass the estate unaffected by any previous registration, according to the construction placed upon the registry acts in Upper Canada. Wherefore, in any point of view, plaintiff was entitled to recover, unless the *Fi. Fa.* bound the lands as a legal interest in the husband in right of his wife as a marital right, and as such liable to be sold in execution, which, however, he contended against. He referred to the statutes 12 Vic. c. 71; 13 & 14 Vic. c. 63, sec. 3; 14 & 15 Vic. c. 7; *Doe dem. McDonald v. Twigg*, 5 U. C. Q. B. R. 167; *Doe dem. Dibble v. Menzies*, 7 ib. 600.

MACAULAY, C. J.—There is no proof of any registration prior to that of the 13th October 1849, and if void because the deed was invalid, it is not a registration within the act.—*Doe Spafford v. Breakenridge* (1 U. C. C. P. R. 492-505); and Perry's wife may have been patentee of the crown *Doe d. Benjamin v. O'Neil* (4 U. C. Q. B. R. 8), *Doe d.*

McDonald v. Twigg (5 ib. 167), Doe d. Dibble v. Menzies (7 ib. 600).

The authorities shew that the interest of a husband in the freehold estate of his wife, whether as tenant by the curtesy or before the birth of children, may be extended on an *elegit* as a possessory legal interest therein (a); and if so, it would seem to follow that it may be sold under a *Fi. Fa.* against lands under the 5 Geo. II. c. 7.

If not, and it depended upon the deeds made between the owners and purchasers under them, there was no valid registration of a deed affecting lands, unless the mortgage of the 8th October 1849, or the sheriff's deed of November 1849, prior to the re-execution of the mortgage on the 1st April 1850, which (if not retrospective) operated from that time, and there was nothing then in the way except the sheriff's deed. If the sheriff's deed was valid, the *Fi. Fa.* preceded the mortgage and bound the interest of the husband during the joint lives of himself and wife; if invalid, and neither the registration of the mortgage nor sheriff's deed was the registration of a deed affecting the lands in law or equity within the registry acts, nothing stood in the way of the re-execution of the mortgage in April 1850, admitting that it might be so re-executed. But, if their registration had effect as affecting the land or title, and the re-execution of the mortgage required a second registration to supply its place in the order in which the deeds were severally executed, a question would then arise whether, if the sheriff's deed was invalid to pass any legal interest in the land to defendant, there was anything for the release of September 1850 to operate upon, if not in itself a grant or bargain and sale, or more than a mere release to enlarge the estate of the defendant; for the mortgage entitled the mortgagors to retain possession till default, and there is no evidence of defendant's being possessed at the time of the release to him, or otherwise entitled than under the sheriff's deed, which did not profess to give him possession in contemplation of law.

(a) Dalton, 136; 2 Kent's Com. 136; 11 Q. B. 917; 6 Bing. 689; Coote on Mortgages, 43.

On these points, however, it is not necessary to express any opinion at present. Being of opinion that the execution did operate to entitle the defendant to the possession during the joint lives of Perry and wife, and being now in possession the plaintiff cannot recover or eject him in this action, whatever his rights may be after the death of Perry the husband.

As to the sheriff's deed being to hold in fee, and so exceeding the interest he was empowered to sell under the *Fi. Fa.* against Perry, my impression is, that it will operate to pass any legal estate or interest, though less than a fee, that could be sold under such execution.

McLEAN, J.—It appears clearly, indeed it was admitted on the trial, that at the time the mortgage was first given to Beattie by Perry and wife there was an execution in the sheriff's hands against the lands of Perry, by which all the lands which he had or in which he had any legal interest within the sheriff's bailiwick were bound. If the land in question had belonged to Perry in fee, he could not have executed an effectual conveyance so as to defeat the execution. Having a present estate in the lands of his wife, he could not divest himself of that estate and thus defeat the remedy of an execution creditor. The mortgage was given on the 8th October 1849, and the sale took place on the 17th November following, so that if the provisions of the statute were observed the land must have been advertised for sale before the mortgage was given. At the time of the sale there was no acknowledgment before two justices of the peace or other competent tribunal by the wife of her willingness to execute the deed; and without such acknowledgment, even had the deed been valid otherwise against the pending execution, the deed could have in law no effect to bar Mrs. Perry or her husband. The interest of Perry then remained liable to be sold on the execution, notwithstanding the attempted assignment by way of mortgage; and being sold to the defendant, he is entitled to hold whatever interest Perry had, which must at all events continue as long as the wife lives, and will

continue during Perry's life if there have been children. The defendant therefore being entitled to the possession, the verdict was properly rendered in his favour. It is not necessary now to decide what may be the position of parties in the event of the death of Perry and wife, or whether the *release* can operate in favor of the defendant to the exclusion of plaintiff's prior claim under the mortgage. My present impression, however, is in favor of the plaintiff's right under such circumstances. The registration of a deed, which in law could have no force or effect whatever, could not make the title, which it did not affect, a registered title. If so, and the title at the time was unregistered, then from the re-execution of the deed by Perry and wife on the 1st April 1850 they were divested of the fee and could not convey to any one else what they had previously parted with.

RICHARDS, J., concurred.

Rule discharged.

MELLISH ET AL. V. WILKES.

Promissory note—Set off.

In assumpsit on a promissory note defendant pleaded set off, money lent, &c., and money due on a promissory note made by plaintiffs. At the trial it was in evidence that goods of the plaintiffs had been forwarded by defendant's steamboat, the amount of freight on which was disputed, and the warehouseman had by defendant's directions refused to deliver the goods till the freight claimed by him was paid,—and the warehouseman having given up to the plaintiffs the goods upon an order of defendant's agent to do so, taking their note for the amount of freight and charges claimed which he did, and upon which note since it became due a portion was paid, and there being conflicting evidence as to whether such note was given conditionally subject to a future settlement, or as a final settlement of the freight, &c., the court set aside a verdict for plaintiffs and granted a new trial, with costs to abide the event.

Assumpsit on a promissory note made by defendant on the 20th of December, 1853, to plaintiffs, for £300; seven days after date; elapsed before suit. Second count—money lent. Third count—an account stated.

Pleas—First. Non-assumpsit to second and third counts.

Second. To the whole declaration, except £250 paid into court, set off—for money lent, money paid, interest and money due on a promissory note made by plaintiffs,

dated the 25th of October 1853, for £103 10s. 3d.—three days after date ; elapsed before suit ; and for money due upon account stated.

Third. To the whole, except the aforesaid £250, payment of residue, and payment of £250 into court.

Replication—similiter to first plea. To second plea—that plaintiffs were not nor are indebted to defendant as therein mentioned—to the country ; no similiter. Replication to third plea, denying the payment alleged—no similiter. Replication to third plea accepts the £250 *pro tanto*.

The plaintiff put in the promissory note for £300 and the defendant the note for £103 10s. 3d. mentioned in the plea of set off, on which was indorsed as having been received £40 7s. 9d. per hands of John Hammill.

In opposition to such set off the plaintiffs contended the note had been given to cover the freight of a quantity of slate that had been carried in a steam vessel of the defendant's from Buffalo to Brantford, the amount of which was disputed and not finally determined owing to the defendant's absence when the note was made. The note was drawn up and delivered to the warehouseman in charge of the slate, subject to freight and charges. The charges for the transport thereof from the state of Vermont to Buffalo were paid in cash ; at the same time the evidence was conflicting on the question whether the note, which was for the full amount claimed on defendant's behalf, had been delivered absolutely or only conditionally to secure the freight, but subject to a future adjustment of the amount.

It was represented on behalf of the plaintiffs, that Hammill had ordered the slate on account of three different persons at Brantford, and was the consignor of the whole. That about the 1st of October 1853, he applied to defendant at Brantford on the subject of its carriage from Buffalo, when he offered to bring it for three dollars a ton, the supposed quantity being 103 tons, but that he Hammill was not willing to give more than two dollars a ton. They then parted without coming to any definite understanding. That on the 6th of October he wrote to the forwarders in charge of the slate at Buffalo, in reply to a telegraph message from them,

requesting them to forward the whole or a part without delay, suggesting the hiring of a vessel and promising a return load of lumber, but adding that he would not be willing to pay more than two dollars a ton including tolls. This letter was answered by the company at Buffalo on the 10th October, recommending Hammill to procure his own boats, as freights were so high and it was impossible to get one at the rate he proposed to pay. The defendant's brother was at that time at Buffalo, acting as agent for defendant's vessels, &c., and that he told the clerk of the forwarder at Buffalo that he had received a telegraph message from defendant to ship it. That the clerk apprised him of what Hammill had written respecting the freight, and being asked how it was to be entered in the bill of lading, he said, put it down as per contract with the defendant. That the slate was shipped accordingly in a steam vessel of the defendant's on the 12th of October 1853, at Buffalo, consigned to Hammill, with this entry, "Lake freight as per contract with owner and G. S. Wilkes of Brantford," and the amount left blank, but when produced at the trial there appeared added four dollars per ton—four hundred and fourteen dollars, this being inserted over the name or signature of the shippers. Explanation was called for, when the purser of the boat, a relation of the defendant's, said he had added it shortly before the trial, not perceiving the impropriety of it. When the slate arrived a good deal of it was broken and damaged—estimated at nearly one fourth of the whole, and has not been removed from the landing-place. The whole came into the charge of Curtis, a custom-house officer and warehouseman, who refused delivering it unless the freight was paid, and four dollars a ton was demanded as being the price charged by the purser. Owing to the difficulty that arose about the freight and defendant's absence, his agent (Scott) on the 25th of October 1853, at the request of Hammill, delivered to him an order addressed to Curtis requesting him on defendant's behalf to deliver to plaintiff the slate belonging to them, and to "take their note for the amount of charges and freight from Buffalo here." Hammill and other witnesses gave evidence to the effect that the note made in

pursuance thereof was only delivered conditionally subject to future adjustment, while Scott and Curtis said they considered it a final settlement of the freight, although, as Curtis said, Hammill did protest and call it robbery. The evidence on this subject was lengthy and circumstantial, but not in all respects definite, and it was conflicting in the most material points.—It was clear however that no distinct bargain had been made with the defendant as to the amount of freight, nor was it explained how or why he came to telegraph to his agent at Buffalo as represented by the forwarding clerk, and the agent at Buffalo was not called. The slate was however carried and all delivered, except what the parties left on the ground as useless. Evidence of negligence in the carriage, whereby the slate was injured, was not admitted with a view to deduct the value thereof from the note to defendant, but it was allowed with a view to the rejection of freight for what was so rendered useless to the owners, if in the end the jury were to adjust the charges for carriage between the parties. There was evidence that four dollars a ton was a reasonable charge at that season. There was no set off for freight pleaded, and it seemed therefore restricted to the note which was pleaded, and it was left to the jury to find for the defendant the balance due on the note, if satisfied it was delivered absolutely in payment of the freight, but to reject it if satisfied it was only delivered conditionally to abide a future adjustment of the freight, which, if so, had not taken place. The defendant's counsel objected that under Scott's order Curtis could make no terms—could only accept a note finally delivered, and that anything else was an excess of authority and void; and that the note being delivered in order to obtain the slate, the plaintiffs were bound, however exorbitant the charge may have been—having elected to give the note rather than incur delay in receiving the slate. Verdict for plaintiffs, and £59 9s. damages.

In the following term, Easter 17 Vic., *M. C. Cameron* obtained a rule upon the plaintiffs, to shew cause why the verdict should not be set aside, &c., on the grounds of misdirection and as against law and evidence, and for the reception of improper evidence.

Dr. Connor, Q. C., shewed cause during the next term, Trinity Term, August 1854, 18 Vic., and contended that there was no misdirection, that the case proceeded on the supposition that the real consideration for the note, and whether made and delivered absolutely or only subject to the future adjustment of the freight, might be gone into; and the objection that the proof given could not be received because not in writing, though contemporaneous, was not taken; and the objection that Curtis the warehouseman had no authority to accept the note on such terms came too late, and there was nothing in such objection. That he was confessedly defendant's agent, and the plaintiffs were not bound to enquire into the precise nature or extent of his authority as between him and his principal, and that if he acceded to the special terms contended for by the plaintiffs, and as the jury must have found, the defendant should be bound accordingly. On the whole merits of the case as in evidence, he pressed strongly for the discharge of the rule, the verdict as it stands being right on the merits and not contrary either to law or evidence, and that there was no misdirection in the way the case went to the jury.

Cameron, M. C., in reply, contended, 1st. There was misdirection, that evidence of a concurrent verbal understanding or agreement—conflicting and inconsistent with the terms of the note—was received and left to the jury. That the evidence did not merely go to the consideration but went to invalidate the note entirely, or to impeach the consideration not entirely, but to some indefinite partial extent, in reduction and not in extinction of the amount, and upon a point respecting which the plaintiffs were estopped by giving the note voluntarily. That the note was to mature in three days; and a condition or term that might not be complied with till after the lapse of that period of time was so entirely repugnant to and inconsistent with the note, that it was contrary to the rule of evidence to admit any proof thereof, either to defeat the note entirely or to reduce it partially. He referred to *Hall v. Francis*, in this court, in Hilary Term last; and to *Besant v. Cross*, 15 Jur. 828, C. P.; *Webb v. Spicer*, in error, 7 D. & L. 324; *Ford v. Burch*, 11

Q. B. 852. He submitted the objection was taken in due time at *Nisi Prius*, and ought to have prevailed. Further, he contended that if such a collateral understanding could be otherwise available to the plaintiffs, it was clear that Curtis had no authority to enter into any engagement of the kind, as the plaintiffs must have well known from the terms of Scott's order and what had occurred during the negotiations, which ended in the note being given and accepted for the freight; and therefore he urged the rule should be made absolute.

MACAULAY, C. J.—It is not clear that as merely affecting the consideration the plaintiffs could not prove that the note was given in security only, and subject to a future adjustment of the charge *pro tem.* for the freight of the slate, and not in payment of the sum demanded. But I am much disposed to think Mr. Cameron's argument on this point correct, and that it comes within the principle of the cases on which this court relied in the case of *Hall v. Francis* cited in the argument. The effect is not to show the note made and delivered for a special purpose as respected the whole amount of it, but upon a concurrent understanding (not in writing) that it was to be subject to the contingency of a future adjustment of the freight in reduction of the amount to an extent disputed and uncertain at the time it was given; and not only so, but such adjustment was to be made not between the parties to the note immediately, but between the defendant and Hammill and a third person. Such an understanding, even if embodied in a contemporaneous writing, would seemingly be regarded as collateral to the note, and not incorporated therein, or engrafted thereon, in which event it would probably not be a promissory note at all, but a special agreement—*Webb v. Spicer* (13 Q. B. 886, 899); though of course that case is distinguishable from the present. What weighs with me is, that even assuming such collateral understanding admissible in impeachment of the note, as showing it to have been conditional and not absolute in the first instance, and the matter to be adjusted still remaining unsettled, still the argument prevails, that Scott

had no authority to authorize a note for freight on such conditional terms—nor did he ; nor had the warehouseman any authority under such order or otherwise to accept a note clogged with such terms so as to bind the defendant, and he denies having done so, nor has the defendant since recognised or acquiesced in or adopted any such conditional transaction. However duress of goods may be set up in support of an action to recover back monies actually paid under undue pressure of that kind, a different rule prevails where a written security is voluntarily given in preference to paying cash.—*Knibbs v. Hall* (1 Esp. 84 279); *Skeate v. Beale* (11 A. & E. 983); *Ashmole v. Wainwright*, (2 Q. B. 837); (*Holt, N. P. C.* 346); *Noble v. Kersey* (4 C. & P. 90); *Galloway v. Bird* (4 Bing. 299). Replevin would not lie in England. Of course this assumes an absolute transaction though under protest, and leaves untouched the question whether a mutual agreement on the subject may not accompany it, so that what is apparently absolute in form may be proved to have been only subject to a collateral understanding. The just view of the evidence seems to be, that in order to get the slate the note was given in preference to payment of cash, (which might have presented a different question); and that the utmost the plaintiffs could have expected in giving the note was defendant's candor in consenting to a reduction of the freight—that is, of the amount of the note—if too high a price had been exacted. But that was a matter resting in his discretion, after the note was given and the slate received under Scott's order. In addition to which it appears by indorsement on the note, that since it became due a portion of the amount has been paid, which implies an admission of liability to pay it; but, as circumstances attending this indorsement were not explained, I do not lay particular stress upon what, if clearly an unconditional payment on account, would of itself go far to conclude the plaintiffs from afterwards disputing their liability to pay the whole. Upon the ground, however, that the note (given as it was) can only be looked upon as a voluntary payment of the freight by a written security, without any authority in the warehouseman to assent to the conditions alleged, as the plaintiffs or their

agent well knew from the terms of Scott's written order, I think a new trial should be granted, unless the plaintiffs acquiesce in the full amount of the note being set off against their demand in this action.

Costs to abide the event, because the rule is not made absolute on the ground that the evidence of a collateral verbal understanding of the nature in question could not be received as an objection that does not clearly appear to have been raised at all at the trial ; because, however that may be, Curtis had not sufficient authority to accept the note clogged with such terms ; and as the case was disposed of at *Nisi Prius*, the nature and extent of his authority, and what he had done, formed, under evidence in some degree conflicting, matter of fact for the jury ; and because the way in which the defendant was induced to telegraph for the slate, or if he did so, how his agent there came to apply for and receive it, were not satisfactorily explained. Wherefore facts to some extent material to the merits must undergo another or further investigation, unless the parties (to terminate litigation and expenses) can arrange between themselves without another trial. If the case goes down again, and the plaintiffs on any ground show themselves entitled to a verdict against defendant, I think they should be entitled to tax the costs of both trials.

The rule *nisi* is to set aside as against law and evidence and for misdirection.

McLEAN, J., and RICHARDS, J., concurred.

JAMES CAMPBELL V. WILLIAM FERGUSSON.

Survey—Improvements.

In ejectment defendant gave notice that he did not defend the title, but claimed compensation for his improvements, which were made on plaintiff's land in consequence of an erroneous survey, made before the passing of the statute 12 Vic. c. 35.

Held, that defendant was entitled to the value of such improvements, although such survey was a private survey and made on defendant's own account.

This was an action of ejectment brought to recover the north-east half of lot number twelve in the third concession from the river Thames, in the township of Harwich, in the county of Kent.

The defendant did not defend the title, but claimed compensation for his improvements, made, as he urged, by reason of an alleged unskilful survey, and defended the action on that ground : he gave the plaintiff the following notice of such his defence :—

“The plaintiff in this cause is hereby required to take notice that the defendant does not contest the plaintiff’s action in this cause for the recovery of the land and premises—to wit, the north-east half of lot number twelve, in the third concession from the river Thames, in the township of Harwich, in the county of Kent, mentioned in the writ of summons in ejectment served upon the defendant in this cause, and of which premises the said defendant is in possession, for any other purpose than to obtain the value of the improvements made upon the said land and premises by the said defendant prior to the commencement of this action and previous to the alteration and establishing of the lines and boundaries of the same premises according to law, and which improvements were so as aforesaid made by the said defendant in consequence of an unskilful survey; and the plaintiff is hereby further required to take notice, that the defendant claims the sum of one hundred pounds for such improvements, on payment of which amount the said defendant will surrender the possession of the said premises to the said plaintiff; that the said defendant does not intend at the trial of this cause to contest the title of the plaintiff to the premises mentioned in the said writ; that this notice is given in accordance with the provisions of an act of the Parliament of Canada, passed in the twelfth year of the reign of her Majesty Queen Victoria, chaptered thirty-five, and intitled, ‘An act to repeal certain acts therein mentioned, and to make better provision respecting the admission of land surveyors and the survey of lands in this province;’ and that the said defendant intends at the trial of this cause to avail himself of having given this notice, as well as of the provisions of the said act, and more particularly of the forty-ninth and fiftieth sections thereof.

“Dated this sixteenth day of February, A.D. 1854.”

The cause was tried before *Draper, J.*, at the last assizes for the county of Kent (Spring 1854); and the defendant proved that he, owning the adjoining half lot, got *Mr. McIntosh, a surveyor, now dead, to ascertain the boundary between his land and the plaintiff’s*; that McIntosh, for that purpose, went to a boundary on the river Thames in

another concession in the same township, and chained from that to the lot in question, and by this means ascertained what *he called* the boundary sought for by the defendant. Defendant in parts cleared over this boundary on to plaintiff's land, and when plaintiff went to settle on his lot would not give up without remuneration for his improvements, which plaintiff refused to pay for.

Becher, for the plaintiff, objected—

1st, That the notice given was not sufficient to entitle defendant to the benefit of the act.

2nd, That the Upper Canada act being repealed, and *this survey—i.e.*, McIntosh's erroneous one—having taken place while that act was law, the present act, 12 Vic. cap. 35, does not apply, not being retrospective in its enactments; and that therefore the defendant has no remedy for his improvements.

3rd, That the survey made by McIntosh and relied on by defendant is not an unskilful survey, within the meaning of either act; that to constitute such survey something must be done by the surveyor in the manner pointed out by law, while in this case everything done by the surveyor was in contravention of law and his duty, and by the means he used he ensured an inevitably wrong result; that in fact the surveyor made no survey at all, and so the defendant not entitled to any compensation.

The learned judge was of this opinion; but by consent the jury found the value of the improvements £25, and of the land, if defendant chose to buy and plaintiff willing to sell, £5 per acre, and verdict for the plaintiff and one shilling damages, subject to the opinion of this court on the whole evidence and objections. If the court is of opinion that the defendant is not entitled under them to the benefit of the statute and the value of his improvements, the verdict to stand, and judgment to be entered, and plaintiff to have costs, and execution to issue in the ordinary way in ejectment suits, without any condition or hindrance as to the valuations made by the jury, and irrespective of them.

If otherwise, the assessments made by the jury to stand,

and plaintiff to be subject to the directions relating thereto as to taking possession, &c.

On the argument, *Cameron*, Q. C., for defendant, contended—1st, That the notice was sufficient ; 2nd, That the erroneous survey was one of the description contemplated by the statute, though it was the error of the defendant's own surveyor, although a licensed one, and although he did not attempt to proceed according to the statute, but performed his operation in a way that must be erroneous ; that the defendant acted *bonâ fide* and could not judge, and as to him it was a want of skill and not such a manifest neglect of this surveyor's duty and the law as to subject defendant to the loss of his improvements ; that it did present a case for compensation under the circumstances.—He referred to 12 Vic. c. 35, sec. 49 & 50, and submitted that the act was retrospective, so as to embrace this case.

Dr. Connor, Q.C., in reply said, the notice served was only material with respect to costs ; and as the defendant had claimed £100, and the jury awarded only £25, he did not become entitled to costs, and the objection ceased to be material, but that the notice did strictly follow the statute.—He referred to P. S. 59 Geo. III, c. 14, sec. 12 ; 2 Vic. c. 17, and 12 Vic. c. 35, secs. 11, 49 and 50 ; *Doe Hare v. Potts*, 5 U. C. Q. B. R. 492 ; *Doe Moule v. Campbell*, 8 U. C. Q. B. R. 19 ; and submitted that no compensation was allowable for private erroneous surveys, but only when they were public or government surveys.

That there was no proof when the alleged correct line was run, nor that the erroneous one was attempted to be run according to the statute in force. That it was performed in total disregard of the statute ; and at all events that all acts prior to the 12 Vic. c. 35, being thereby repealed, compensation could not be claimed by reason of surveys erroneous, or correcting surveys previously made.—He relied on the statute and the cases cited, and the fact supplied thereto, as shewing that this was not a case for compensation within the statute 12 Vic. c. 35.

MACAULAY, C. J.,—I did not concur in the decision come to in *Doe d. Hare v. Potts* (5 U. C. Q. B. R. 492), and in my opinion the defendant is entitled to advance a claim for improvements as having been made on plaintiff's land in consequence of unskilful survey.—12 Vic. c. 35, sec. 46.

On the evidence, we must infer that the unskilful survey was before the statute 12 Vic. c. 35, and the survey correcting the error since the passing of that act; and if so, I see no reason to question the application of the statute to such a case.

Judgment accordingly—that is, the verdict to stand. I think the act applies to such sub-division lines as well as to side lines between lots.

McLEAN, J., and RICHARDS, J., concurred.

IN THE MATTER OF THE SCHOOL TRUSTEES OF THE TOWN OF
PORT HOPE V. THE TOWN COUNCIL OF THE TOWN OF
PORT HOPE.

School Trustees—Municipal Council.

The communication by a Board of School Trustees to the Municipal Council of the town of a resolution of the Board that the chairman do authorise the secretary of the Board to notify the Town Council to *furnish* the Board with a sum of money *immediately*, for the purpose of purchasing a site for a school house and erecting a school house thereon,—a copy of which resolution was sent to the Town Council,—is not such a compliance with the provisions of the statute 13 & 14 Vic. c. 48 as to render the Town Council liable to be compelled to pay the amount by mandamus.

Rule *nisi* for a mandamus. This was a rule upon the Town Council of Port Hope to shew cause why a mandamus should not issue, commanding them to levy by rate upon all the real and personal estate of the freeholders and householders of the said town the sum of £2500 and the costs of collecting the same, and to pay over the said sum of £2500 to the Board of School Trustees of the town of Port Hope, for the purpose of purchasing a school site and erecting a school house thereon, in compliance with the request of the said Board of School Trustees, upon the affidavit and papers filed, and why they should not pay the costs of the application.

The affidavit of W. Waller, secretary to the Board of School Trustees of the town of Port Hope, sworn the 16th

of June, 1854—That a resolution, of which a copy was annexed, was passed by the said Board, and that in compliance therewith he did on the 15th of May, 1854, transmit a copy of the letter annexed containing copies of two resolutions passed by the said Board, and that such letter was laid before the Town Council of Port Hope, of which he is also clerk; and that the said Town Council have not furnished the said board with the said sum of £2500 or any part thereof, but have neglected and refused so to do. The letter referred to is as follows:—

“TOWN HALL, Port Hope, 15th May, 1854.

“*To the Town Council of Port Hope :*

“GENTLEMEN,—I am directed by the Board of Common School Trustees to transmit you the following resolutions passed by the said Board on Saturday last, the 13th of May, 1854—namely: ‘Moved by the Rev. J. Baird, seconded by Mr. Warren, that the chairman of this Board do order the Town Council to *furnish* this board with the sum of £2500 *immediately*, for the following purposes—namely, £500 for purchasing a site for a central school, and £2000 for the erection of a school house thereon.—Carried.’

“(Signed) W. BURNHAM, *Chairman*.

“Moved by Mr. Gillett, seconded by Mr. Baird, that this Board will require from the Town Council the sum of £200, to meet the incidental expenses of this Board for the current year, and that the Town Council be notified of the same.—Carried.’

“(Signed) W. BURNHAM, *Chairman*.

“I have the honor to be, gentlemen,

“Your obedient servant,

“(Signed) W. WALLER, *Secretary*.”

Affidavit of W. Burnham, chairman of the Board of School Trustees of the town of Port Hope, sworn the 16th of June, 1854—That at a meeting held by the said School Trustees at the town of Port Hope, on the 13th of May, 1854, a resolution was passed to raise £2500—namely, £500 for purchasing a site, and £2000 for the erection of a school house thereon; that in pursuance thereof the said Town Council were requested to furnish the said Board with the said sum of £2500 for the purpose aforesaid; that the said Town Council have neglected and refused to furnish

the same, and that the said Board of School Trustees have contracted to purchase a site for the said school house, and have agreed to pay for the same the sum of £500.

Wilson, Q.C., shewed cause, referring to *The School Trustees of Brockville v. The Town Council of Brockville*, 9 U. C. Q. B. R. 302, which seemed to deny any discretion in the Municipal Council when properly called upon.

He contended—1st, That the application is to levy a rate, whereas it should have been to pass a by-law for that purpose, or to raise the money, if not in hand, as the Council might prefer.

2nd, That the demand was not to levy a rate or pass a by-law, but to furnish £2500 immediately: an unreasonable, if not an impracticable request; and at all events not that which the court is now called upon to enforce by mandamus: that one thing was demanded and another sought to be enforced.

3rd, That the demand should be of something specific and duly authorized—*Regina v. The Bristol and Exeter Railway Company*, 4 Q. B. 162; whereas there was nothing to shew the proposed school house necessary, nor any estimate prepared and laid before the Council, as the act required—referring to 12 Vic. c. 81, sec. 177; Municipal Act of 1851, sec. 4; 13 & 14 Vic. c. 48, sec. 12 No. 12; sec. 18, No. 1.; sec. 20, 21, 24, Nos. 3, 4, 6 & 9; and 16 Vic. c. 185, secs. 1 & 6;—that it was a mere arbitrary requisition for a large sum, without anything satisfactory to justify it.

4th, That the Trustees were bound to call a public meeting in like manner and under the same regulations as school trustees of township school sections—16 Vic. c. 185, sec. 5.

5th, That the Board of Trustees might impose a rate themselves, and having a remedy in their own hands, are not entitled to ask the aid of a mandamus.

He also read an affidavit in reply of Duncan McLeod, sworn the 26th of August, 1854—"That he is a member of the Town Council of Port Hope, and that no public or school meeting of the freeholders and householders and other taxable inhabitants of the said town or any ward therein was called by the said Board of School Trustees,

nor was any notice given by them of any such meeting, nor did any such take place, to consider the question of the purchase of a site for a central school and for the erection of a school house thereon, at any time since the 24th of July, 1850, so far as he could recollect and inform himself; and that since the day and year aforesaid, so far as he can recollect and inform himself, no application has been made and no estimates have been laid before the said Town Council by the said Board of School Trustees on behalf of the majority of the freeholders, &c., of the said town, at any public meeting before then called for the purpose aforesaid;" and submitted that their proceedings were not regular or according to the statutes, and were too loose and general to support the present application.

Richards, in reply, relied on the 13 & 14 Vic. c. 48, sec. 24, No. 6, as authorizing the steps taken: he denied that any more specific estimate was necessary, the amount resting in the discretion of the Board of Trustees, who must be supposed to have satisfied themselves of the propriety and expediency of the expenditure. He contended that no public meeting or vote was a necessary preliminary, and that the passing a by-law was involved in the levying a rate, which could not be done without it; wherefore, if material, the one was equivalent to the other, and that the council were to provide the money in the manner desired by the Board.

That the Trustees were not bound to levy a rate themselves, but were entitled to call upon the Municipal Council, whose duty it became to provide the amount; and if that was refused, a mandamus was the proper course, to compel performance of the duty declared by the statute, &c.—16 Vic. c. 185, secs. 1 & 6.

MACAULAY, C. J.—The 13 & 14 Vic. c. 48, sec. 24, No. 6, enacts that it shall be the duty of the Board of School Trustees, &c., among other things, to *prepare* from time to time and *lay before* the Municipal Council, &c., an estimate of the sum or sums which they shall judge expedient, &c., for the purchasing school premises and for building school

houses, &c. ; and that it shall be the duty of the Common Council to *provide* such sum or sums in such *manner* as shall be desired by the said Board of School Trustees.

I am desposed to think, that instead of this the Board of School Trustees may levy a rate for such purposes without reference to the Municipal Council of the town—16 Vic. c. 185, sec. 1, and sec. 6, 21.—But whether or not, I think that application may be made to, and that if properly made, it is the duty of, the Municipal Council to provide the monies in manner desired ; and that if refused, a mandamus may be moved.

I do not think a vote of the rate-payers necessary in the case of cities and towns, &c., as it is within school sections of townships (16 Vic. c. 185, sec. 6), as was decided in the case of *The School Trustees of Brockville v. The Town Council of Brockville* (9 U. C. Q. B. R. 302 ; 13 & 14 Vic. c. 48, sec. 24, Nos. 1, 6, and Nos. 4, 6, sec. 18, No. 1, and sec. 12, No. 7.)

But on the present application, I do not think, first, That the proper estimate is shewn to have been *prepared* and *laid* before the Municipal Council ; for I do not consider the communication of a resolution of the Board of Trustees that the chairman do order the secretary to notify the Town Council to *furnish* the Board with £2500, *immediately*, for the following purposes—namely, £500 for purchasing a site for a central school house, and £2000 for the erection of a school house thereon—such an estimate as the statute contemplates, and as the Town Council, when called upon to pay so large a sum out of the funds of the municipality, may reasonably expect, or that the courts are bound, as a matter of course, to enforce such a general demand. It is merely a peremptory requisition for a large sum of money ; and if twice or ten times as much were right, the court might as well be moved to enforce the payment without any additional explanation to shew it a reasonable exercise of the very wide discretion and powers vested in the Board. Nor do I think a demand to furnish such a sum *immediately* reasonable, without shewing that the municipality possessed funds ready to be so applied at a moment's notice.

We are not asked to compel performance of what the resolution required merely to compel the Municipal Council to furnish the £2500 immediately, but to order them to levy a rate, &c.

To enforce the levy of a rate is not to compel that which the Board of Trustees demand. If we were moved to grant a mandamus to order the immediate furnishing of the amount according to the resolution of the Board of Trustees, I apprehend we would not be prepared to do so without more appearing than is shewn on this application;—then, in place thereof we are asked to direct that to be done which the Municipal Council was not asked to do; nor do I consider that which was asked was equivalent. It appears that the funds were already in hand, not that the process of a rate was required to be resorted to.

In exercising the large powers vested in the Board of Trustees when a direct taxation to so large an amount is to be imposed upon the inhabitants, not by the Board directly, but through the Municipal Council upon their requisition, we must see that the terms and substance of what the statutes and the law require have been correctly complied with. One thing required is the preparation of an estimate; another is, a distinct application to the council to do that which we are called upon to enforce. My impression is that the present proceedings are deficient in both these respects.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged without costs.

COLIN DAWSON REID V. THOMAS JONES AND JAMES CAHILL.

Attachment—Irregularity.

Trespass for assault and false imprisonment—Defendants justified under a writ of attachment of contempt against plaintiff; to which plaintiff replied that the rule on which said writ of attachment issued was irregularly issued, and that the court, upon motion afterwards made, by rule of the same court duly made, ordered that the said writ of attachment and the said rule on which the same issued and the arrest of plaintiff thereon, should be set aside, as having been obtained *ex parte*. On demurrer to the replication, on the ground that the matters therein set forth are not sufficient to deprive the defendants of the protection of the writ—

Held, that the replication was good; that the attachment being set aside for irregularity was displaced *ab initio*, and afforded no protection to defendants under it.

Writ issued the 14th of January, 1854—Declaration the 6th of February, 1854. Trespass—For that defendants on, &c., *vi et armis*, assaulted plaintiff, and then seized, took and imprisoned plaintiff and kept and detained him in prison without any reasonable or probable cause whatever, for a long time—to wit, &c.—contrary to law and against the will of plaintiff, whereby plaintiff was thereby greatly exposed and injured in his credit, &c.; and other wrongs to plaintiff then did, against the peace of our Lady the Queen and the damage of plaintiff.

Pleas, by defendant Jones:—That before the committing of the said trespass in the declaration complained of—to wit, in Trinity term, 17 Victoria—upon application made in that behalf to the Court of Queen's Bench by said Jones through his counsel, it was ordered by rule of the said court that a writ of attachment of contempt should be issued out of the said court against the now plaintiff as by said rule now filed in the office of the clerk of the court at Toronto appears: that after said rule was so made and granted—to wit, on, &c.—said Jones, having so obtained the said rule, sued and prosecuted out of the said Court of Queen's Bench at Toronto upon said rule, and in pursuance thereof a certain writ of our Lady the Queen, called a writ of attachment of contempt, directed to the sheriff of the United Counties of Wentworth and Halton, commanding said sheriff that he should attach the said now plaintiff so that he might have his body before Her Majesty's justices at Toronto on the last day of Trinity term then instant, to answer, &c.; that

after the said writ was so sued out, and whilst the same was in full force, and before the return thereof, to wit, on, &c., the same was delivered to Edward Cartwright Thomas, Esquire, who then and from thence until at and after the return thereof was sheriff of the said united counties of, &c., to be executed according to law; that after said writ was so delivered to said Thomas as such sheriff as aforesaid, and whilst the same was in full force, and before the return thereof, to wit, on, &c., the said Thomas, so being such sheriff as aforesaid, within his said counties, under and by virtue of said writ, took and arrested the said now plaintiff by his body, and had and detained him in his custody as such sheriff as aforesaid, according to the exigency of said writ, which are the same trespasses in the declaration complained of: concluding with a verification.

Plea, by defendant Cahill:—That before the committing of the said trespasses in the declaration complained of, to wit, in Trinity Term, 17 Victoria, upon application made in that behalf to the Court of Queen's Bench by defendant Jones through his counsel, it was ordered by rule of the said court that a writ of attachment of contempt should be issued out of the said court against the now plaintiff, as by said rule now filed in the office of the clerk of the court at Toronto appears; that at the time of granting the said rule as aforesaid said Cahill was and from thence hitherto hath been and is an attorney of the said Court of Queen's Bench for U. C. at Toronto, and that being such attorney, and as such having been duly retained and employed by the said Thomas Jones for the purposes thereafter mentioned: that after the said rule was granted as aforesaid, to wit, on, &c., the said Cahill, so being the lawful attorney of and for the said Jones as aforesaid, in pursuance of the said rule, and for and on behalf of the said Jones, sued and prosecuted out of the Court of Queen's Bench at Toronto upon said rule a certain writ of our Lady the Queen, called a writ of attachment of contempt, &c., as in defendant Jones's plea; and concluding with a verification.

Replication to plea of defendant Jones:—That said rule in said plea referred to was irregularly issued out of the

said court; and that the said court, on motion afterwards, to wit, in Michaelmas Term, 17 Vic. 1853, and before suit, by rule of the same court, then and there duly made, it was ordered that the said writ of attachment and the said rule on which the said attachment issued, and the said arrest of said plaintiff on said attachment, be set aside, on the ground that said attachment was obtained *ex parte*, and the rule *nisi* on which said rule for said attachment issued was not served on said plaintiff, as by said rule so issued as aforesaid in Michaelmas Term, 17 Vic. 1853, now fully appears: concluding with a verification.

Replication to plea of defendant Cahill:—That said defendant Cahill, then being and acting as the attorney of defendant Jones, to wit, in Trinity Term, 17 Victoria, 1853, instructed, caused and procured the said counsel mentioned in said plea of said Cahill to move the Court of Queen's Bench that a writ of attachment of contempt should be issued out of the said court against the now plaintiff; and the said rule was then so granted and issued, which is the same rule mentioned in the said second plea of the said defendant Cahill; and plaintiff avers that said rule was irregularly issued, &c. as in the replication to Jones' plea: concluding with a verification.

Demurrer to replications to pleas, on the ground that the matters set forth in the said replications are not sufficient to deprive the defendants of the protection under the said writ.

The demurrer was argued during this term. On the argument, *Eccles*, for the demurrer, contended that the pleadings did not shew what the attachment was for, or that it was in the nature of civil process, which, if it was, should appear or be replied: that any legal process will protect the parties acting under or in obedience to it while subsisting, and that if rescinded, they cannot be made trespassers by relation; that the cases to the contrary found in the books had deviated from the principle that a judgment or execution or other judicial proceeding or process was a valid protection while remaining in force, and that no one could be made a trespasser *ab initio* by their being set aside: that the rule when judgments, &c., are set aside on error equally

applied to all writs, &c., rescinded by order of the courts; and that there was no distinction in principle between reversing for error or setting aside on motion for irregularity or any other cause; that the issue of all process, *mesne* or final was ostensibly the act of the court, and every reversal was on some ground of error—call it irregularity or any other name; and that of all processes that by attachment, which only issues upon the express order of the court, should be thus regarded; that, whether ordered improvidently, inadvertently, or by surprise, it was equally the act of the court; and if any imposition or malpractice had been resorted to to mislead the court, the proper course was to punish the contempt by another attachment against the offending parties; and that, on whatever ground afterwards set aside, the attachment in this case protected the defendants who acted upon it.—He referred to and commented upon the following cases—*King v. Harrison*, 15 East. 612; *McCarthy v. Perry et al.*, 9 U. C. Q. B. R. 215; 19 M. & W. 191; *Jones v. Williams*, 8 M. & W. 349; *Rankin v. DeMedina*, 1 C. B. 183; *Prentice v. Harrison*, 4 Q. B. 830. He placed much reliance upon the issue of the writ being the express act of the court upon motion made; and therefore, if wrong, the fault of the court and not of the mover, who is not alleged to have alleged anything falsely, or to have suppressed the truth.

Read, for plaintiff, submitted that the well established distinction was between error and irregularity—*Bryant v. Clutton*, 1 M. & W. 409; S. C. T. & G. 843; *Brown v. Jones*, 15 M. & W. 191; S. C. 3 D. & L. 681; *Rankin v. DeMedina*, 1 C. B. 183; *Parsons v. Lloyd*, 3 Wil. 341–5; S. C. 2 Blk. Rep. 746; *Montforton v. Montforton*, 4 U. C. Q. B. R. 338; *Prentice v. Harrison*, 4 Q. B. 857; *Philips v. Biron*, 1 Stra. 509; *Britton v. Cole*, 12 Mod. 179; *King v. Harrison*, 15 East. 612; *Sowell v. Champion*, 6 A. & E. 407, 8 ib. 449; *Bates v. Pilling*, 6 B. & C. 38; *Hopkins v. Salembier*, 5 M. & W. 423; 7 Dow. 493.

That, being set aside for irregularity, the attachment was vacated, displaced *ab initio*, and could afford no protection to the parties, unless specially reserved and retained in force

for that purpose : that the court must have regarded the parties who applied for the writ as capable, or any action against them would have been restrained, or the court, in setting it aside, would have otherwise provided for their protection ; but that as it was, they had no defence and could not set up an attachment no longer existing ; that they could not aver it to be of record or that there was such a record ; and that it was in effect obliterated from the files and records of the court, and for reasons that left the defendants unprotected and exposed to this action.

Eccles, in reply, urged that its having been granted *ex parte* did not shew an irregularity on defendants' part that should so expose them and subject them to an action for what the court ordered to be done ; that the court often issues attachments *ex parte*, as upon a return of rescue, &c. ; and that saying it was set aside for irregularity and then explaining that such irregularity consisted in what did not shew it to have been irregular, was insufficient to implicate defendants in a suit like this ; that the court will notice the ground on which the writ was set aside, and that it was not one to render defendants liable to be harassed with an action of trespass.—He cited *McCarthy v. Perry et al.*, 9 U.C.Q.B.R. 215, on which he relied as quite in point in defendants' favor.

MACAULAY, C. J.—It appears to me the replication displaces the justification pleaded for a cause alleged, which supports the action.

It shews that Jones, through his counsel, and Cahill, as his attorney, through counsel, applied to the court for and obtained the rule for the attachment, and afterwards obtained such attachment and delivered it to the sheriff, &c.; and that such rule, writ, and the arrest under it, were afterwards, by another rule of the court, set aside as irregular, on the ground that the attachment was obtained *ex parte*, and that the rule *nisi* on which it issued was not served on the plaintiff. Now, these grounds do not shew that the process was merely erroneous in law ; but that being good in form of law, they were unwarranted, in fact, and therefore quashed or set aside and vacated *ab initio*.

It cannot be attributed to and intended to be solely the act of the court in granting the rule and issuing the attachment, but rather that it was a case requiring personal service or service in some way or other of the rule *nisi*, which had not been made; wherefore the attachment was ordered upon an *ex parte* application, without the proper opportunity to be heard being afforded to the plaintiff. - That must be looked upon as the fault of the applicants: were it not so, the court in supporting the rule and attachment might have protected the defendants against any action like the present, as in *Stanford v. Robinson* (3 M. & G. 489).

It appears to me, under the facts pleaded, to range within those decisions that have held the plaintiffs in ordinary writs of original or final process, afterwards set aside for irregularity, to be thus liable. All writs are technically the act of the court, though ordinary writs are sued forth by the party as of right, or as of course, without the special intervention of the court: whereas an attachment only goes upon special rule or order. But it does not follow that if the court has been surprised into granting such an order, owing to the fault of the prosecutor or applicant, the same may not be set aside; and being, as alleged in this case, so set aside for irregularity on the grounds stated, it must not be intended, I think, that it was owing to the fault of the defendants and not of the court. Had the court not so regarded it, the rule or attachment would have been quashed as having *improvidently* issued, and the defendants would have been protected from the consequences. It cannot be intended that the same was irregularly issued, though they may have issued improvidently by the deliberate and express order of the court: that it would be *error* only, and not *irregularity*—*Parsons v. Lloyd* (3 Wil. 341, S. C. 2. W. B. 846); *Bryant v. Clutton* (1 M. & W. 406), T. & C. 843; *Carrett v. Smallpage* (9 East. 341), *Sowell v. Champion* (6 A. & E. 407), *Codrington v. Lloyd* (8 A. & E. 449), *Blanchenay v. Burt* (4 Q. B. 707), *Prentice v. Harrison* (1 Dow. & M. 50, S. C. 4 Q. B. 857), *Rankin v. DeMedina* (1 C. B. 183), *Sugars v. Concarren* (5 M. & W. 30), *McCarthy v. Perry* (9 U. C. Q. B. R. 215), *Painter v. The Liverpool Oil and Gas*

Light Co. (3 A & E. 433). As to the distinction between putting in force as parties and acting in obedience to a writ — Jones v. Williams (8 M. & W. 357), Brown v. Jones (15 M. & W. 191), Perkins v. Plympton (7 Bing. 680), Turner v. Felgate (1 Lev. 95), Cohen v. Monegan (6 D. & R. 8).

The legal liability of justices of the peace to actions of trespass after convictions that would have justified them have been quashed, unless partially protected by acts of parliament, are analogous: being quashed, it is as if it had never been, except so far as its existence is presumed for the protection of innocent parties, expressly or impliedly.

Judgment against the demurrer.

McLEAN, J., and RICHARDS, J., concurred.

JOHN LAKE AND HANNAH LAKE, HIS WIFE, v. BENJAMIN
BOWMAN BEMISS.

A declaration in case for seduction not containing an averment of loss by plaintiffs of the service of the person seduced, nor any averment that the person seduced was the servant of plaintiffs, is bad on demurrer.

A declaration by the mother for the seduction of her daughter is bad for not alleging the death of the father.

Writ issued 20th March, 1854. Declaration 5th June, 1854.

Case for seduction. Declaration states that defendant, after the statute 7 Wm. IV. ch. 8, and before suit, to wit, on, &c., seduced one Jane Headen, then and from thence hitherto and still being an unmarried female, and the daughter of the said plaintiff, Hannah Lake, born before the intermarriage of said plaintiffs, John Lake and Hannah, and, to wit, on the day and year aforesaid, and on divers other days and times between that day and this suit, debauched and carnally knew said Jane Headen, whereby she became pregnant and sick with child, and so remained and continued for a long space of time, to wit, nine months next following; at the expiration whereof, to wit, on, &c., said Jane Headen was delivered of a child, &c., by means whereof and of the several premises, said Hannah Lake, as the mother of said Jane Headen, hath suffered great agony of mind, *loss, injury* and *wrong*, to plaintiffs' damage, &c.

Demurrer, on the grounds that the declaration contains no averment of any loss by the plaintiffs, or either of them, of the service of the said Jane Headen, in consequence of the seduction, nor any averment that the said Jane Headen was the servant of the plaintiffs.

The demurrer was argued during this term, by *Irving* for plaintiffs and *Read* for defendant.

MACAULAY, C. J.—The declaration, if otherwise good, appears to me bad at all events for not alleging the death of the girl's father, without which the mother would not be entitled to sue under the statute, even if not married, much less as a feme covert, if loss of service is material to the action.

The decisions under the provincial statute 7 Wm. IV. ch. 8, establish, I think, that the relation of master and servant—in other words, that service is to be presumed at the time of the seduction, and until and at the time of sickness, which disables from and causes loss of service. It must be so to be consistent with the principle of the action, which is to be adhered to, and which requires the relation of master and servant, and service, not only at the time of the seduction, but also at the time of the consequential sickness, occasioning loss of service, which is the gist of the action; the effect is that, in form, the declaration is the same as before, in which loss of service must be averred. (7 M. & G. 1033; 10 Q. B. 725.) But that service is presumed upon the relation of parent and child, leaving seduction and consequential sickness, to a degree disabling such servant from rendering services, to be proved.

The same facts must be established on this head as formerly; but being established, they have relation to the parent, as master or mistress, whose servant the daughter is conclusively presumed to be; in short, the seducer is estopped from denying that the daughter was the servant of the parent, both when seduced and when she became sick and incapable of serving by reason of her pregnancy and confinement in childbirth.

I am still disposed to think, as I remarked in *Kimball v.*

Smith, that the statute has virtually changed the nature of the action, from one resting on the relation of master and servant to that of parent and child, and in effect to entitle the latter to an action for seduction of his or her child, except that it somewhat inconsistently requires proof that such seduction led to consequences that would have established loss of service in an action founded on the relation of master and servant, although neither the relation of master and servant, nor the loss of service in fact, required to be proved; but service being presumed, sickness and inability to serve would of course be evidence of and prove loss of service, presuming the relation of master and servant subsisting throughout, as did that of parent and child. It follows that this declaration is bad.

As a general rule, the wife cannot be joined in suit for loss of service; but whether under this statute, the father being dead and the mother surviving, could maintain an action for a seduction during his life-time, or having married again and the seduction taking place since the second marriage of the mother, she can join in the action, which in substance is for the seduction of her daughter, though in form for loss of service, which is only fiction, are questions. The last may be raised upon an amended declaration in this case, alleging the death of the father, the marriage of the mother to her present husband, and the subsequent seduction, &c. One difficulty will be, that if the daughter were living with the mother all the time, the action for her seduction would not lie in favor of the mother in England, when loss of service, which would be to the husband and not his wife, constitutes the gist of the action.

If, however, the plaintiffs think the case can be sustained upon a declaration differently framed, they have leave to amend, as advised, upon payment of costs.

McLEAN, J., concurred.

RICHARDS, J.—Whatever view is taken of this declaration, it is bad. If it be contended that under the provincial statute 7 Wm. IV. ch. 8, it is not necessary to allege service or loss of service, and that the seduction itself is an

injury for which an action will lie by the father, or in the event of his death by the mother, without alleging service; still this declaration is defective in not shewing that the father of the girl seduced was dead, or in not shewing that she was the legitimate daughter of the female plaintiff. If the conclusion arrived at in the Court of Queen's Bench, in this province, be correct—and I am inclined to think it is—that our statute does not change the law in relation to this subject, but only indirectly relieves parties by dispensing with proof of service when the father or mother is the plaintiff in the action, then of course the declaration is clearly bad. The difficulty of declaring, if the seduction took place after the marriage of the female plaintiff with her present husband, must be considered so far as relates to the necessity of alleging loss of service on behalf of the wife during her coverture, from the seduction of her daughter, when, as a general rule, the husband alone can sue for the loss of service in actions of tort arising from injuries to the wife herself. Whether in this case a declaration could be specially framed, stating the character in which the action is brought by the husband and wife, somewhat in analogy to those cases where the wife sues in her representative capacity and the husband is necessarily joined, will be a matter for the consideration of the plaintiffs, and which we cannot now with propriety determine. There is a case in the Court of Queen's Bench (*Brown et ux. v. Devlin*), in which a special declaration was framed under the statute, and in which I am told the court refused to arrest judgment. Judgment was entered in that case for the plaintiffs, on 14th August, 1851.

Judgment for the demurrer.

NOTE.—See 7 M. & G. 1033; 13 M. & W. 738; 5 Q. B. 297; 6 M. & W. 56; 1 Ex. 61; 11 Jurist, 750; *Davies v. Williams*, 16 L. J., 369; 4 B. & C. 660; 10 Q. B. 725, S. C. as 16 L. J.; *Roscoe's Evidence*, 483; 5 U. C. R. 33; 7 U. C. R. 146; *Barrett v. Oliver*, U. C. R. June, 1846; *McLain v. Ainslie*, Mich. Term, 6 Vic.; *Gill v. Brown*, Easter Term, 4 Vic.; 1 U. C. R. 106, 351.

THE COMMERCIAL BANK OF THE MIDLAND DISTRICT v.
MUIRHEAD.

The loss of a bond, &c., not being in issue, evidence may be given of its contents without proving the loss.

Defendant being security for plaintiffs' agent in the sum of £1000, and the agent having misapplied a larger sum than the amount of the bond, but gave a mortgage to plaintiffs of certain lands, which were sold under an order of the Court of Chancery, and the proceeds applied towards payment of the sum due, leaving a balance larger than the amount of defendant's bond: *Held*, that plaintiffs were entitled to apply the proceeds of the sale of the mortgaged lands in reduction of the general balance, and not in exoneration of the defendant's bond.

Debt on bond, made the 19th of September, 1834, made by defendant, which, having been lost by accident, the plaintiffs cannot produce, and excuse profert, in the penal sum of £1,000, conditioned for the fidelity of William Richardson, plaintiffs' agent at Brantford. The words stated are, "if said Richardson should not, during his continuance in the said office, embezzle, mispend, negligently lose, purloin, or unlawfully take away or destroy any money, bills, notes, &c., belonging to the plaintiffs or any of their customers, &c.; and in case the plaintiffs should sustain any loss, damage, or prejudice by the misbehaviour or neglect of said Richardson; then if he or defendant indemnified and made good, &c., then, &c." *Breach*—That while such agent, said Richardson received, to wit, one thousand pounds, which sum he misspent, and unlawfully took away and appropriated to his own use, by means whereof, &c.

Pleas.—First. Non est factum; Second. Traverses the misspending, &c., modo et forma, &c. Third. Payment of one thousand pounds in satisfaction by said defendant after breach. Fourth. That after breach—to wit, on 1st December, 1838—said Richardson, by indenture, mortgaged certain lands to plaintiffs, which they received in full satisfaction of their debt and damages by reason of the breach of said condition. Fifth and six pleas demurred to.

Replication.—Similiter to first and second pleas; to third, traverse; to fourth, that said Richardson did not convey, nor did plaintiffs accept or receive, the said lands by way of mortgage in said plea mentioned, in full satisfaction and

discharge of said debt, and of all damages by reason of the detention thereof, modo et forma, &c. Judgment for plaintiffs on demurrer—*Venire tam quam*.

At the trial, Cameron, cashier of plaintiffs' bank, Toronto, since 1837, a witness for plaintiffs, proved Richardson's agency at Brantford from 1834 to 1838; that defendant and James Racy were his sureties to the bank; that he (witness) had in his possession the bond given by them; that he gave it to the solicitors of the bank (Strachan & Burns), and it has been lost; that he saw it last about 1842, and knows it was executed, exactly after a bond of another agent which was produced; that there were subscribing witnesses to the bond, but did not remember who they were, and had not been able to find out; that he had frequently spoken to defendant on the subject of his bond, and he never denied his liability; that he assisted witness to obtain a mortgage of Richardson, on a liability admitted by him of £4945 16s., which Richardson admitted he had received and not accounted for. The amount exceeded the penalty of the bond, and the mortgage included two notes indorsed by defendant for Richardson. In June last £2981 12s. 2d. remained due, exclusive of interest—all the property mortgaged, except a small town lot in Vienna, having been sold by order of the Court of Chancery, and proceeds applied, and the above balance still due. And he said that he had a settlement with Richardson in 1838; that part of his debt was on promissory notes, not all;—the mortgage included a debt due by Richardson to Barrett & Heward;—and that the mortgage was taken with defendant's privity, and he assented to it all. The plaintiffs had one bid allowed, and bought in all but the Vienna lot, and gave credit for it £2080, received against which the costs in Chancery are charged. A letter from witness to defendant 12th March, 1838, and defendant's answer, shewn.

Defendant objected—

First, That the loss of the bond was in issue and not proved.

Second, That the subscribing witnesses had not been sufficiently inquired after.

Third, That the land mortgaged was sold at too low a price.

Fourth, Not distinctly at all, that the monies received were applicable to the £1,000, for which defendant, as a surety, was liable in the first instance, and not against the general balance, leaving defendant liable on the bond for the ultimate sum, after crediting proceeds of the mortgaged lands. The learned judge who tried the cause (*Robinson, C. J.*) overruled the first objection; the other issues he left to the jury, ruling that mismanagement or neglect in relation to the sale of the lands, or of notice respecting a prior mortgage from Richardson to Street, would not be any evidence to support the plea of payment.

The jury found for plaintiffs £1,000.

M. C. Cameron obtained a rule on the plaintiffs to shew cause why the verdict should not be set aside on the grounds of objection above raised.

Hon. *J. H. Cameron, Q. C.*, and *H. Cameron* shewed cause.

At the argument much stress was laid upon the insufficiency of the proof of the execution of the bond, and of the want of diligence in ascertaining the names of the subscribing witnesses; but at the trial the only objection seems to have been that the loss of the bond required to be proved, and was not sufficiently shown in the absence of the plaintiffs' solicitors, to whom it was proved to have been delivered some years ago.

MACAULAY, C. J.—I am, however, disposed to think the learned Chief Justice's ruling on that point correct: namely, that, not being traversed, the loss was not in issue, and the plaintiffs entitled to go into proof of it without proving its loss.

Then, as to the fact of the defendant having given such a bond, there seems no reasonable ground to doubt it; and although it was witnessed by two subscribing witnesses, the plaintiffs' cashier, who formerly had it in his possession and delivered it to their solicitor, said he could not recollect the names of such witnesses, and that he could not

find out. The solicitors were not called, nor was the cashier asked whether he had applied to them, or what exertions he had made to find out who the subscribing witnesses were. It has been held that although secondary evidence of a lost bond may be given without its production, still that the best evidence of its execution, if denied, is not dispensed with, and that the subscribing witnesses, if any, must be called or accounted for. This seems reasonable where the names are known, although perhaps not quite reconcileable with the rule distinctly laid down, that there are no degrees in secondary evidence when secondary evidence is admissible. The defendant did not call the solicitors, or any other person to whom the plaintiffs' agents might have been expected to apply, to show who the witnesses were, and there was no evidence that with more diligence the names might have been ascertained. Perhaps such proofs on defendant's part ought not to be expected, as it would impliedly admit the bond in fact, and narrow his defence to the mere absence of the subscribing witnesses as the only persons technically competent to prove it until accounted for.

The case cited from 2 Peak. N. P. C. 88 so much resembles the present as respects the excuse for not producing the subscribing witnesses, and it being so clear by defendant's own admission that he had given the bond, I think we ought not to entertain the objection, not only because it was not distinctly raised at the trial, but because it is by no means clear that the evidence was not sufficient in itself.

Second. I do not think the mortgage is proved to have been accepted as a satisfaction of the defalcation and in exoneration of defendant as surety.

Third. Or that the plaintiffs were bound to apply the proceeds recovered under it in exoneration of the defendant's bond for £1,000, instead of in reduction of the general balance; and that, consequently, although £1,000 has been recovered under the mortgage, the defendant continues liable, more than £1,000 still remaining due.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

McFARLANE V. ALLEN ET AL.

Recognizance of bail—Enrolment of, &c.

It is not necessary that the name of the principal debtor should be joined in a recognizance under the statute 10 & 11 Vic. c. 15, nor that a specific sum should be mentioned therein as the amount for which the debtor was arrested.

An allegation in a declaration upon a recognizance of bail in the words, "as by the said recognizance still remaining of record in the office of the said deputy clerk of the crown for the county of, &c., more fully appears," is a sufficient averment of enrolment.

The venue in an action on a recognizance is correctly laid in the county in which the recognizance remains of record.

Writ issued 31st of March, 1854. Declaration, 1st June, 1854—debt on recognizance of bail—states that plaintiff heretofore—to wit, on, &c.—in the Court of Common Pleas, by the consideration and judgment of the same court, recovered against one David McWhirter £291 11s. 9d., adjudged to plaintiff by said court for his damages which he had sustained, as well, &c., as for his costs, &c., and whereof said McWhirter is convicted, as by the record and proceedings still remaining in the same court at Toronto, in the county of York, will more fully appear; and that plaintiff, for having execution of said judgment, afterwards—to wit, on, &c.—sued out of the said Court of Common Pleas at Toronto, a certain writ of our Lady the Queen called a writ of *Capias ad Satisfaciendum*, tested, &c. directed to the sheriff of the county of Prince Edward; by which said writ our said Lady the Queen commanded the said sheriff that he should take said McWhirter, if he should be found in his county, and him safely keep, so that he might have his body before her Majesty's said Court of Common Pleas at Toronto on the first day of Trinity Term then next, to satisfy plaintiff £291 11s. 5d., which plaintiff lately in her Majesty's said Court of Common Pleas had recovered against said McWhirter for his damages, &c.; and that the said sheriff should have there then said writ, which said writ was afterwards, and before delivery to the sheriff—to wit, on, &c.—indorsed to levy £275 15s. 5d., being the damages, with interest, from, &c., and £15 16s. costs, with interest from, &c., writs, sheriff's fees, &c., which said writ so indorsed afterwards, and before the return thereof—to wit, on, &c., was delivered to James

McDonald, who then and from thence, and at and after the time of making the arrest hereinafter mentioned, was sheriff of said county of Prince Edward, in due form of law to be executed; by virtue of which said writ said sheriff, before the return of said writ—to wit, on, &c.—and within his county, as such sheriff—to wit, at the town of Picton—arrested said McWhirter, and then and there had and detained said McWhirter in his custody as such sheriff, at the suit of plaintiff, for the cause aforesaid. And plaintiff saith that said McWhirter, being so arrested and in custody of said James McDonald, so being sheriff of the county of Prince Edward as aforesaid, by virtue of said writ, at the suit of said plaintiff, and being desirous of obtaining the benefit of the gaol limits assigned to the gaol of the county of Prince Edward, and said defendants then having agreed to become bail for said McWhirter remaining and abiding within the limits assigned to the gaol of the county of Prince Edward, they (defendants) afterwards—to wit, on, &c.—according to the form of the statute in such cases made and provided, then came in their proper persons before one Joseph Allen, then being a *commissioner duly appointed* to take and receive all and every such recognizance of bail in and for said county of Prince Edward as any person or persons should be willing to acknowledge before him in any action or suit, &c.; and defendants then, before said Joseph Allen, so being such commissioner as aforesaid, entered into a recognizance of bail, and thereby became pledge and bail to the said limits for the said McWhirter; and the said defendants, in and by the said recognizance, then undertook that the said McWhirter should remain and abide at suit of plaintiff within the limits of the gaol for the county of Prince Edward, and not depart therefrom unless released by due course of law; and that said McWhirter would obey all notice, &c., and in the event of his failing in any particulars, that they (defendants) would pay such sum of money, costs, &c., as said McWhirter was liable to pay by virtue of said writ; and that the said recognizance having been so entered into and acknowledged before said Joseph Allen, so being such commis-

sioner as aforesaid, said recognizance was afterwards—to wit, on, &c.—duly filed in *the office of the Deputy Clerk of the Crown and Pleas* in and for the said county of Prince Edward, being the same in which said recognizance was so acknowledged and taken, and the said arrest so made as aforesaid, pursuant to the statute in such case made and provided. And the plaintiff further says that the said bail was afterwards—to wit, on, &c.—duly allowed by the judge of the County Court of the county of Prince Edward, as by the recognizance still remaining of record in the office of the said Deputy Clerk of the Crown and Pleas for the county aforesaid fully appears; and that said McWhirter then became entitled to and received and took the benefits of the limits of the gaol of the county of Prince Edward; and plaintiff in fact saith that said McWhirter did not remain or abide at suit of plaintiff within the limits of the gaol of said county, but went and removed beyond said limits, and departed therefrom without having been released therefrom by due course of law, contrary to said recognizance; and that at the time he so departed he was liable to pay a large sum of sheriff's fees, &c., as amounting to a large sum of money—to wit, &c.—whereby an action hath accrued, &c.

The defendant Allen pleaded *nul tiel record*. The defendant Ruttan demurred to the declaration, on the grounds—First, That it is not alleged in the declaration for what amount the defendants became bail. Second, That it is not alleged or stated in said declaration that said recognizance is a record in court, or was ever brought into the Court of Common Pleas at Toronto, or enrolled in the said Court of Record; nor is it shewn to be a record of the court, which it should have been shown to be before the plaintiff was in a condition to refer to it as remaining of record; also, that the declaration contains no sufficient averment to show a valid recognizance; and it is also bad in alleging that said recognizance still remains of record in the office of the said Deputy Clerk of the Crown and Pleas for the County of Prince Edward. Third, It is not alleged that any affidavit, by any creditable person present

at the taking of the recognizance, of the due taking thereof, was made and filed therewith. Fourth, Not shewn by said declaration that McWhirter was a party to the recognizance or to the condition thereof, or that he entered into the said recognizance with defendants, without which the same would be invalid and contrary to the statute. Fifth, That the declaration is bad, the action being brought in an outer county upon a record of the Court of Common Pleas at Toronto.

On the argument *Richards*, for the demurrer, contended passing over the first ground of demurrer. As to the second, that a recognizance was not a record enrolled, which was not properly shewn to have been done in this case, which is of a recognizance taken under the P. S. 10 & 11 Vic. c. 15, sec. 5: that though to be filed it could not be effectually enrolled in the office of the Deputy Clerk of the Crown in the county of Prince Edward: that the principal debtor ought to be a party according to the statute, and the fact that he was so should appear on the face of the declaration; that, consequently, it was not shown to be a recognizance of record, and is invalid if it was so; also, that the venue is wrong laid in the county of Prince Edward, instead of the county of York, where the record of the recognizance, if any, must or should be, and that attempting to record it in the county office of Prince Edward was a nugatory proceeding, and the action therefore apparently brought upon a recognizance not enrolled or entered of record—*Welsh v. Troyle*, 2 H. B. 31, 76; 2 Sal. 600, 658; *Bond v. Isaac*, 1 Bur. 409; *Underhill v. Devereux*, 1 W. Sand. 72, notes *b*, *c*; *Coxeter v. Burke*, 5 East. 461:—that the practice of this court is identical with that of the Queen's Bench, which follows the practice of the Queen's Bench in England, and not of the Common Pleas, which the plaintiff here seems trying to adopt—12 Vic. c. 63, sec. 8; 3 U. C. Q. B. R. 400; 7 ib. 22; 8 ib. 389: that had the declaration stated the recognizance to have been acknowledged in open court and so of record, the fact, if traversed, might be proved by proof that the present recognizance was enrolled by

the court here; but as it is, that a like effect cannot be ascribed to it, and distinguished from bail or mesne process: that there is no allegation that the recognizance is enrolled or that the debtor is a party to it, and consequently the declaration is bad in form and substance—Sand. 68, Tidd's Prac. 743–1083, 9th ed.; Glynn v. Thorpe, 1 B. & A. 153, 2 N. Rep. Rule 50, U. C. Hilary Term, 13 Vic.

Vankoughnet, Q. C., submitted that enrolment was not necessary, as the statute 10 & 11 Vic. c. 15, sec. 5, renders the recognizance complete upon its being filed when it became a record, and of record, and so of record in the county in which it was filed: that being allowed by the county judge, (16 Vic. c. 175, sec. 17), and filed, it was, *ipso facto*, a record to all intents, and binding conclusively upon the bail: that if it required enrolment, its enrolment is in effect averred in the allegation that it remains of record, as the cases in the books show; and that it may be well enrolled in the Prince Edward office with the sanction of or by the direction of the court, which must be presumed so long as the regularity of the entry is not excepted to: that it is a branch of the principal office, and an office of the court in which many proceedings are recorded, and where a recognizance of this kind may be well enrolled if authorized by the court: that if it means of record, as alleged, such a record would sustain the issue upon a plea of *nul tiel* record, which is the proper way to raise the question, and not by a demurrer like the present. He referred to the course and form of proceedings under various other recognizances requiring enrolment, such as statutes staple, statute merchant, bail to the action, and special bail, &c., all of which may be enrolled in such office as the court approves of or directs as the proper office of enrolment and deposit.

Richards, in reply, repeated that no recognizance, unless acknowledged in open court, became a record till enrolled; however, after enrolment, it might have relation to the time of the caption as a binding obligation on the bail; that enrolment should be averred, and that it was not averred in the terms of this declaration, which evidently pointed to the filing and allowance of the bail-piece as remaining of

record, and not to a subsequent enrolment still remaining, &c.; that the declaration merely "as by the recognizance still remaining of record," and not as by the record of the said recognizance, importing its enrolment still remaining, &c., appeared—Chitty, Junior's, Forms, 434, and other precedents; Jones v. Williams, 8 M. & W. 357; Ferguson v. Mahon, 11 A. & E. 175-9.

MACAULAY, C. J.—As to the necessity for the name of the principal debtor being joined in the recognizance under the statute 10 & 11 Vic. c. 15, sec. 5—it does not appear whether he is a party to the recognizance or not; and I expressed my opinion in a case (Cotton v. Tracey) in chambers on the 22nd of December, 1852, that the omission would not invalidate the recognizance as respected the liability of the bail. I still adhere to such opinion. It is not necessary that a specific sum should be mentioned in the recognizance: it points to the judgment and execution, whereby it is ascertainable.

I do not think that an affidavit of the caption was made essential in this action.

I think the declaration sufficiently shews a binding recognizance of record: it alleges the judgment, *Ca. Sa.*, arrest of the debtor, his being in custody, the defendants becoming bail for him to the limits before a commissioner duly authorized to take bail, the filing and allowance of the recognizance—as by the *recognizance still remaining of record* in the office of the said Deputy Clerk of the Crown for the county of Prince Edward aforesaid fully appears—16 Vic. c. 175, secs. 7, 8, 15, 17.

I think this allegation sufficiently avers that such recognizance is of record, and if so a record; and if enrolment thereof be necessary to perfect it as a record, it is implied in such averment, so much so that I think *nul tiel* record might be well pleaded thereto; and upon an issue to the record, the plaintiff would be required to produce that which, as being a record, would support the averment in the declaration upon a trial by the record—Gillespie v. Grant (3 U. C. Q. B. R. 400).

The enrolment or entering of record is the act of the court; and if the court have authorized such enrolment in the county office of Prince Edward, I do not see that (however exceptional in point of regular practice) it may not be done, or that it is not a record because entered there. I consider it competent to the court to enrol such recognizances in the county offices where filed so far as material to bind the bail, and that it is not absolutely necessary to transmit it to the principal office for enrolment. It is enrolled in an office of the court, a branch of the crown office, and in some points of view more correctly enrolled there than in Toronto. Many proceedings are by statute authorized to be entered of record in the county offices. This shews it may be done without incongruity; and on reference to the 10 & 11 Vic. c. 15, sec. 5, the propriety of retaining the recognizance in the office in which it was originally filed will be apparent. It follows that, in my view of the matter, the record being in the county of Prince Edward, the venue is correctly laid in the same county, and that judgment should be against the demurrer.

McLEAN, J., and RICHARDS, J., concurred.

TOWNSEND V. HAMILTON.

A verdict having been rendered for plaintiff against defendant, a sheriff, for an amount exceeding his indemnity, correct on the evidence adduced at the time; but it appearing that the defence had been neglected by the nominal defendant, and affidavits having been filed impeaching the evidence at the trial, and of the discovery since the trial of evidence in defendant's favor, the court set aside the verdict and granted a new trial on payment of costs.

TRESPASS for seizing saw-logs, timber, chains, and converting, &c.

Pleas—Not guilty per statute; and, second, not plaintiff's goods.

The goods were seized by defendant, as sheriff, &c., under a writ of attachment, at the suit of one Collins, against the effects of one Frederick Smith, and plaintiff claims them to have been his.

To prove title, plaintiff put in evidence a sealed agreement, dated the 1st of December, 1851, whereby William

Haron, Benjamin Haron, and Elijah William Haron sold to plaintiff all the pine trees standing and fallen on the south 100 acres of lot No. 119 township of Bayham south, on the Talbot road, with authority to him and agents, &c., to enter within three years to cut and carry away, &c., in consideration of \$1,000, to be paid \$500 on or before the 1st of July then next, and the residue on or before the 1st of January, 1853. It is signed and sealed by William Haron and B. W. Haron, not by Elijah Haron, but by D. J. Townsend, per Frederick Smith; witnessed by J. M. Bell. A blank receipt for \$390 not signed.

To shew authority in F. Smith, a power of attorney under plaintiff's hand and seal was put in, dated the 1st of December, 1850, in words, with no additional *year* nor any full stop, and witnessed by C. H. Marshall, appointing Frederick Smith, of Vienna, Canada, his attorney, to enter upon a certain 100 acre lot, the timber on which had been sold to him by William Haron in Bayham (not numbered), and to cut all the timber thereon, and to ship the same to Black Rock. The power is very comprehensive in relation to the management of plaintiff's lumber affairs in Canada. The plaintiff resided at Black Rock, United States; Frederick Smith at Vienna, Canada. The timber in question was at Port Burwell. The plaintiff gave sufficient *prima facie* evidence to establish his title, and he proved the seizure, &c.

His title was not impeached on the defence, and the attachment against Smith which was issued out of the county court was admitted. The plaintiff also gave evidence of quantity, loss, value, &c., and the jury found for the plaintiff £488 15s.

A rule *nisi* was obtained to set aside the verdict, on the grounds of surprise, and on grounds disclosed in affidavits filed, and for excessive damages, and on affidavit of Collins of the discovery of material evidence since the trial, and of his ability to prove many material matters impeaching plaintiff's title if a new trial is granted.

Dalton, for plaintiff, shewed cause by affidavits in reply conflicting with the statements contained in Collins' affidavit, and supporting his own title as *bonâ fide*.

Dr. Connor, Q. C., replied, and relied upon the discovery of new evidence, as sufficiently shewn in Collins' affidavit, to entitle defendants to relief. He also remarked upon the discrepancy in the dates and contents of the power of attorney from plaintiff to Frederick Smith, and Smith's contract for the timber, neither of which were proved by the subscribing witnesses, who might have been produced. He urged that, though indemnified, he was not so indemnified to the amount of the verdict, and that both he and Collins were taken by surprise; that, in favor of public officers and *bonâ fide* creditors, the court would be disposed to grant relief; and urged strongly for a new trial on terms, the merits not having been investigated or understood at the last one.

MACAULAY, C. J.—This case is felt to be attended with much difficulty so far as respects the propriety of granting the relief prayed. There is room to apprehend that the defendant, on the record being indemnified by Collins, took no trouble in defending the suit until he found a large verdict rendered against him, and that Collins strangely neglected to attend to the defence, being in effect the real defendant.

Under such circumstances we are prepared to relieve against a verdict correct on the evidence given at Nisi Prius upon affidavits containing much matter calculated to impeach such verdict.

Among other grounds, the discovery of evidence is relied upon. Perhaps no one ground is of itself sufficient to sustain the application; but referring to the notes of evidence, and the exhibits filed especially, the power of attorney and deed of sale apparently differing in date, though seemingly having relation one to the other, and neither of which were proved by the subscribing witnesses; and comparing and considering the bearing of the whole in connection with the matter contained in the affidavits, we are so far impressed that the merits of a suit involving a large sum of money have not been fully or satisfactorily investigated, that, although it is deviating from the strict course and going the utmost length in favoring the application, we do not feel that we could satisfactorily confirm this verdict or refuse another trial on payment of costs.

Per Cur.—Rule absolute.

MICHAELMAS TERM, 18 VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.

“ “ A. McLEAN, J.

“ “ WM. BUELL RICHARDS, J.

TAYLOR ET AL. V. THE COMMERCIAL BANK.

An assignment of goods, &c., to plaintiffs, accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods transferred, is sufficient to give the assignment validity, and to protect the goods from execution creditors; and that in this case the transfer and change of possession, being complete before the *Fi. Fa.* against goods at the defendants' suit was placed in the sheriff's hands, the plaintiffs were entitled to recover.

Interpleader issue, to try the plaintiffs' right to certain goods, on the 10th of June 1854, against defendants, execution creditors of three persons named Clarke. It appeared the defendants had a judgment and *Fi. Fa.* against Clarkes' goods in the hands of the sheriff of the united counties of York and Peel; that Clarkes owned a store of goods in Whitby; and wishing to prefer the plaintiffs, the Clarkes made an assignment thereof to the plaintiffs on Saturday, the 27th of May, 1854, and delivered the same to them that night, and a note of delivery endorsed on the bill of sale, dated the 29th of May, and signed by the Clarkes; the bill of sale entitled them to any surplus after paying off the debt due plaintiffs of £655 and interest, costs and charges, and one yearly salary of £62 10s. to the clerk in charge; that plaintiffs received the key after a symbolical delivery of the goods by portions in the name of the whole. All seemed clear and *bona fide*, except that the mortgage or assignment in trust was not registered, and contained this clause “that if the said goods, &c., shall not, when sold by the said party of the first part (the Clarkes), in such manner and upon such terms, and for such fair prices as under the circumstances the said party of the first part in their discretion may stipulate for and fix pro-

duce sufficient to pay the said debt, &c., then said party of the first part will pay the balance or residue to the said party of the second part, (plaintiffs.)

A *Fi. Fa.* at defendant's suit against Clarkes' goods was afterwards placed in the hands of the sheriff of Ontario, and the same goods seized by him under it, as being liable to the execution against Clarkes' goods.

Leave was reserved to move a non-suit on the grounds that Clarkes were to sell the goods, and to do so must retain possession, and not being registered, the sale was void; that the goods of Clarkes being seized in Toronto, in the county of York, on the 27th of May, the sale to plaintiffs, in the apprehension of an execution to the sheriff of Ontario, was colourable, fraudulent and void as against defendants.

The jury found for the plaintiffs, thereby affirming the sale as *bona fide*.

A rule *nisi* for a non-suit being obtained,

Vankoughnet, Q. C., shewed cause, and submitted that *first* meant *second* party in the clause relied upon by the defendants, the one having been inadvertently inserted for the other; at all events, that the possession was changed, and so registration not essential to protect the transfer to secure a *bona fide* creditor, whom the debtors, Clarkes, might prefer.

MACAULAY, C. J., delivered the judgment of the court.

On reference to the 12 Vic. ch. 74, and 13 & 14 Vic. ch. 62, we think it sufficiently appeared in this case that the assignment was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to take the case out of the provisions of the statutes that require registration to give them validity and to protect the goods from execution creditors. We also think the debtors (Clarkes) might legally prefer the plaintiffs by such an assignment, and that, as the transfer and change of possession were completed before the *Fi. Fa.* against goods at the defendants' suit was placed in the hands of the sheriff of the county of Ontario, the plaintiffs are entitled to hold the same.

We do not think the clause in the bill of sale relied upon by the defendants (if not to be regarded as an inadvertent error) sufficient to invalidate the assignment, because it did assign the goods, and the plaintiffs did receive and retain possession—possession having accompanied and followed the deed. The case seems clear in favour of the plaintiffs, who appear to be *bona fide* creditors, preferred before execution against the goods in question had issued, and protected by a transfer sufficient in form and really intended to pass the right of property to the plaintiffs for their benefit as such creditors.—See *Riches v. Evans* (9 C. & P. 640), and *Wood v. Dixie* (7 Q. B. 892), which seem applicable to a case like this, however questionable as to its full extent.

Rule discharged.

WOODHILL V. THE GREAT WESTERN RAILWAY COMPANY.

A railway company is not responsible for damages occasioned by the negligence of sub-contractors in making the road where such damage was occasioned, by said sub-contractors doing acts which they were not required by their contract to do.

CASE.—The declaration sets out the formation of the company; the union of the Port Sarnia Railway Company with it; that plaintiff was possessed of a close—viz., the south half of the south half of lot No. 3, 3rd concession, Lobo—excepting the part of it taken by defendants for their road, intended as a branch to Sarnia; that defendants were on the 28th of May, 1854, constructing such branch, then and still incomplete; that plaintiff was possessed of trees and timber growing upon his close of the value of £250, and thereupon it was the duty of defendants not to commit the grievances thereafter named: yet defendants, on 29th of May, 1854, wrongfully lighted upon the land so taken by them for said branch a certain fire, in such a careless, negligent, and improper manner, and at a time when, by reason of the then state of the wind and weather, it was dangerous and improper so to do—to wit, on 29th of May, 1854: that by and through the mere negligence, &c., and for want of due and proper care, the fire extended itself

from the land taken by defendants to the trees, &c., of the plaintiff, which caught fire and were burned, to damage of plaintiff of £250.

Plea—Not guilty by statute.

At the trial, before *Macaulay, C. J.*, at the last London assizes, it was proved that defendants took the portion of land through the close for their branch with plaintiff's leave, subject to a question as to price to be thereafter settled; that notice was sent a day or two before to the plaintiff's brother that the burning of the brush would commence on this part of the road on the day named. The weather was dry and the time usual; no high wind; and one witness stated that no care would have prevented the fire from spreading. And it was admitted that Mr. Zimmerman was the contractor for formation of this branch with defendants, and that he sub-let his contract to Dunn, whose servants and workmen burned the brush complained of.

Becher, for the defendants, objected—That the cause of action, if any, was not such as stated in the declaration; that no negligence was shewn, and the burning was a lawful act, done in the usual way and at the usual season, for the formation of the railway; and that the defendants were not liable, as the work was done by the servants of a sub-contractor of their contractor, Zimmerman.

The learned Chief Justice permitted the case to go on, with the assent of counsel on both sides, that the verdict should be subject to the opinion of the court on the law and facts, and that the court might direct a non-suit or verdict for the defendant to be entered.

The jury found for the plaintiff and £50 damages.

During this term *Becher* obtained a rule *nisi* to set aside the verdict for plaintiff.

C. Robinson shewed cause and contended that the case of *Dean v. McCarty*, 2 U. C. Q. B. R. 448, does not shew that the defendants are authorized to do what they did at all risks;—he referred to *Bush v. Steinman*, 1 B. & P. 404; *Laugher v. Pointer*, 5 B. & C. 547; *Milligan v. Wedge*, 12 A. & E. 737; *Hobbitt v. The London & N. W. R. W. Co.*, 4 Ex. R. 254; *Petrie v. Rowan*, 16 Eng. 445. That the

defendants are enjoying a privilege, and are permitted to interfere with private property, and are bound to conduct themselves with proper prudence.

Becher, in reply, contended that the negligence is not made out; that there is a variance in the damage proved and that stated in the declaration; that the defendants were doing a lawful act, and no negligence is shewn; that if there was negligence on the part of the contractors, the case of *Allen v. Hayward*, 7 Q. B. 960, and *Duncan v. Finlator*, 6 C. & F. 894, shew the defendants not liable; that the plaintiff should have proceeded under the arbitration clauses of the act incorporating the company, if his property was damaged.

MACAULAY, C. J.—The defendants having contracted with Zimmerman to open the road for a railway, among other things, through the close in question, and Zimmerman having contracted with Dunn, Dunn, by his servants, burnt brushwood on the part of plaintiff's lot taken by defendants by virtue of the statutes; that the fire spread and did damage to other parts of plaintiff's premises; and the question is, whether the defendants are liable or not in an action on the case for such consequential injury.

The cases seem to me clear to shew that on the evidence the defendants are not liable, and that the verdict should be for defendants; the servants of Dunn, a sub-contractor under Zimmerman, the principal contractor, under defendants, were not the defendants' servants, nor did the contract require that such fires should be made, or any nuisance, public or private, be committed. In this it is distinguishable from the cases relied upon by the plaintiffs.

McLEAN, J.—It is quite clear to me that the defendants are entitled to succeed in their application to set aside the verdict and enter a nonsuit. There is nothing to connect them in any way with the injury occasioned to the plaintiff beyond the bare fact that they were authorized by law to construct a railroad from London to Port Sarnia, and that they had contracted with a Mr. Zimmerman to clear the

track, and that he had employed agents under him to do so. It was not attempted to be shewn that the defendants and those who under a sub-contract from Zimmerman had been engaged in burning the brush along the line of road, stood in the relation towards each other of masters and servants; on the contrary, no inference can be drawn from the testimony except that they did not. Then if they were not the agents or servants of the defendants, it appears impossible to hold the defendants answerable for their acts: the work they were engaged in was lawful—was carried on under a person wholly unknown to the defendants, and who had no right to look to them for anything in the shape of remuneration for his services. The defendants could neither direct nor control the time of burning, whether properly or improperly chosen, and could not under such circumstances be guilty of the negligence complained of in the declaration.

The cases of *Reedie & Hobbit v. The London and North Western Railway Company* (4 Exchr., 244), *Quannan v. Burnett* (6 M. & W., 499), *Rapson v. Cubitt* (9 M. & W. 710, 12 A. & E. 734, 4 P. & D. 794), *Mulligan v. Wedge*, *Allen v. Hayward* (17 Law Jour., Q. B., 99; S. C. Q. B. 960, 7 Com. Bench 783), all shew that where parties enter into a contract which is in itself lawful, and the contractor in carrying on his work does anything injurious to another, he alone is responsible for his act.

RICHARDS, J., concurred.

Rule absolute to set aside verdict and enter nonsuit.

O'DELL V. COYNE.

A person having become the purchaser of land under a sale in Chancery, and having received possession on condition that he allowed the wheat and straw there to be removed, does not acquire any legal right to the straw as emblements under such purchase.

TROVER for straw. Pleas—Not guilty and not possessed. The facts appear to be that Wm. Sullivan, deceased, owned a farm, which a person named McCallum had worked on shares; that his time was out during Sullivan's life-time, except that he was entitled to one-third of the grain yielded by a crop of wheat growing in the ground at the time of

Sullivan's death; that after Sullivan's death, his widow administered to his estate and sold the wheat so growing in the ground to the plaintiff, subject to McCallum's interest therein; that the defendant became owner of the estate in fee, by a sale in Chancery, before the wheat was ripe, and received possession on condition that he allowed the wheat and straw to be removed; that when ripe, McCallum harvested it, and placed it in a barn on the premises, as he was bound to do; that he and plaintiff afterwards jointly threshed it out by a threshing machine, and divided the grain; that the straw was thrown up in a pile as it came from the machine, and McCallum having no right to any of the straw, the plaintiff claimed it all as his own, and was prepared to remove it off the premises, when the defendant forbid him doing so, and at the same time claiming it as his own; that was the conversion complained of.

There was evidence conflicting on the question, whether the straw was expressly mentioned in the sale to the plaintiff or not, and there was some evidence of its being usual not to include the straw in such sales of growing crops, but that it should be left upon the farm &c.

Being left to the jury, they found for the defendant.

Rule *nisi* to set aside verdict for defendant was obtained during this term.

MACAULAY, C. J.—It appears to me the rule should be made absolute—the growing crops at the death of Sullivan, belonged in law to him or McCallum; if it belonged to Sullivan, it went as emblements to his administratrix after his death, and she had a right to sell it, and if so, did sell it to the plaintiff, subject to McCallum's right to one-third of the grain.

If in law the right of property in the growing crop was in McCallum, he did afterwards harvest and thresh it jointly with the plaintiff, and in pursuance of the sale that had been made by the administratrix delivered two-thirds of the grain and all the straw to the plaintiff, McCallum disclaimed any right to the straw, the plaintiff claimed it, and both the administratrix and McCallum assented thereto.

The defendant became entitled to the land (seemingly after Sullivan's death), and got possession of the place upon the understanding that the owners of the wheat and straw were not to be disturbed in threshing out the grain, and removing both it and the straw; at all events, the defendant shewed no title to the straw, nor did he acquire any legal right thereto, or to have it consumed or used upon the premises, merely as having become the proprietor of the farm at the time when and as he did, so far as appeared at the trial.

The refusal to permit the plaintiff to remove the straw, made as it was constituted evidence of a conversion; and I think the plaintiff was legally entitled to recover the value of such straw, as being the legal owner of and entitled thereto.

McLEAN, J., and RICHARDS, J., concurred.

Rule absolute.

SPENCER V. THE ONTARIO MARINE AND FIRE INSURANCE COMPANY.

Replication, de injuria.

To a declaration on a policy of insurance on plaintiff's goods, in which plaintiff averred that he had delivered an account stating the particulars of the loss and damage, signed by and verified by the oath of plaintiff, and was ready and willing to prove the same, &c., by such means as the defendant's should reasonably require, and as far as it was in plaintiff's power to do according to the conditions of the policy—defendant's pleaded that although plaintiff did make oath of his loss, yet defendants say that although they did afterwards and within a reasonable time thereafter and before suit—to wit, on, &c.—require further and additional evidence of the amount and particulars of such loss and damage, being a proper and reasonable request in that behalf; yet plaintiff did not duly, properly and reasonably prove his said loss and damage, according to the form and effect of the condition of said policy.

To this plea, plaintiff replied *de injuria*.

Held, on demurrer to the replication, that the plea was matter of excuse, and *de injuria* a good replication thereto.

Action on policy of insurance made by defendants on the 4th of September 1852. Declaration, after setting out the policy of insurance, the conditions endorsed thereon, and the loss by fire of the goods, and averring that the goods, &c., were not insured in any other office than that of defendants, and that plaintiff used his best means and endeav-

ours to save the goods, states that plaintiff did forthwith after the loss and damage aforesaid—to wit, on, &c.—give notice thereof in writing, to the secretary of the defendants, and also so soon after as possible—to wit, on, &c.—did deliver an account stating the particulars of such loss and damage, signed by the plaintiff and verified by the oath of the plaintiff, and was ready and willing to prove the same by the production of his books of account and such other means as the defendants should reasonably require, and as far as it was in the power of the plaintiff so to do; and did also in the said oath or affidavit declare that no other insurance than the insurance aforesaid with the defendants, and the whole value of the said property and effects, and the interest of him, the plaintiff, in the said property and effects; and did also declare therein in what general manner the building insured and described in said policy was occupied, and who were the occupants, and when and how fire originated so far as the plaintiff knew or believed; and that he, the plaintiff, did also produce to defendants, under the hand of a magistrate most contiguous to the place of the fire and not concerned in the loss or related to the plaintiff, a certificate stating that he, the said magistrate, was acquainted with the character and circumstances of the plaintiff; and that he had made diligent enquiry into the facts set forth in the plaintiff's statement; and that he believed that plaintiff, by misfortune and without fraud, had sustained by such fire loss and damage to the amount in such statement mentioned; and plaintiff avers that he hath in all things conformed himself to and observed all and singular the said articles and conditions, matters and things, which, on his part were to be observed according to the form and effect of the said policy; and although the stock of defendants was and is sufficient, &c., and although sixty days had elapsed, &c., and although defendants have duly received the preliminary proofs of loss required by the condition of the said policy, and although thirty days after such receipt of proof had elapsed before suit, yet defendants, &c., to plaintiff's damage of, &c.

Plea—That although the plaintiff did make oath of his said loss, for plea nevertheless defendants say that although they did afterwards and within a reasonable time thereafter and before suit, to wit, on, &c., require further and additional evidence of the amount and particulars of such loss and damage, being a proper and reasonable request in that behalf; yet the plaintiff did not duly, properly and reasonably prove his said loss and damage according to the form and effect of the condition endorsed upon said policy; and this defendants are ready to verify, &c.

Replication—That defendants, of their own wrong and without the cause as to the household furniture and effects in said plea alleged, broke their covenant as to the said household furniture and effects, as in declaration alleged: concluding to the country, &c.

Demurrer to replication *de injuria*, on the ground that the form of replication is inapplicable to the plea, inasmuch as the plea does not contain matter of *excuse* for the breach, and that plaintiff ought to have traversed one or more of the averments in the plea; and because the plea denies that plaintiff ever had any cause of action.

The demurrer was argued during this term.

Read, for demurrer, contended that the condition of the policy declares that the assured should give proofs of the loss within a reasonable time; that the replication *de injuria* will not be allowed when the plea shews that plaintiff had no cause of action.—*Symons v. Lloyd*, 7 Q. B. 402. *Hagarty*, against the demurrer, contended that the plea is merely matter of excuse: he referred to *Morgan v. Price*, 8 C. B. 113; and *Catterall v. Catterall*, 4 Ex. R. 615.

MACAULAY, C. J., delivered the judgment of the court.

We think the plea clearly matter of excuse, and not in denial or discharge, and that *de injuria* is a good replication thereto; the sufficiency of the plea itself has not been questioned.—See *Symons v. Lloyd*, 7 Q. B. 402, which is clearly distinguishable from the present case, and *Morgan v. Price*, 8 C. B. 113, and *Catterall v. Catterall*, 4 Ex. R. 615, which were cited for plaintiff.

The plaintiff's cause of action never vested ; if he was bound to do what the seventh plea alleges, and did not comply, the facts, if a valid defence, excuse the defendant's refusal to pay the amount of the policy on the plaintiff's goods. It seems quite clear in plaintiff's favour.

Per Cur.—Judgment against demurrer.

SPENCER V. THE ONTARIO MARINE AND FIRE INSURANCE COMPANY.

Practice—Notice of Assessment.

Defendants were let in to plead on terms of pleading at once and taking one day's notice of trial. Pleas were accordingly filed and served ; and replications thereto, each concluding to the country, were filed and served, and similiter added by plaintiff, and two days' notice of trial given ; the record was entered on the assize day low on the docket, having been passed the day before, and on the following day defendants filed and served a demurrer to plaintiff's replication to one of defendants' pleas, which was entered on the record before the trial.

Defendants moved to set aside verdict for plaintiff, on the ground that they were entitled to notice of assessment.

Held, that they were not so entitled.

COVENANT on a policy of insurance. At the trial a verdict was rendered for the plaintiff, £100, amount insured on the goods, and £3 15s. interest, making together £103 15s.

A rule nisi was obtained to set aside verdict for plaintiff for irregularity, with costs, on the ground that after the record of Nisi Prius was passed and entered, a demurrer to plaintiff's replication concluding to the country was filed, and no notice of assessment was afterwards given, and on affidavits and merits.

It appeared that on the 18th October, 1854, judgment by default was signed for want of a plea ; that on the 19th October it was mutually agreed in writing between the attornies of both parties that the interlocutory judgment should be withdrawn, defendants paying costs and filing pleas at once, plaintiff to have his own time to reply, and defendants undertaking to go to trial at the next assizes on a day's notice ; that pleas were filed : that replications thereto were filed and served on the 25th October, each concluding to the country, &c., and similiter added by plaintiff ; that two days' notice of trial was given ; that the record of

Nisi Prius was passed on the 26th October, and entered for trial at the Woodstock assizes on the 27th October, low on the docket. That on the 28th October defendants filed and served a special demurrer to the plaintiff's replication of *de injuria* to defendants' seventh plea; that the cause was tried on the 2nd of November, the assizes having commenced on the 27th of October. The defendants rely upon the rule number twenty-three of Hilary Term, 13 Vic., and the practice of the court, as entitling them to notice of assessment as well as of trial, and that the notice of trial alone was insufficient.

The demurrer was entered on the Nisi Prius record before trial, but whether by leave or order of the court does not appear, and the venire is *tam quam*.

As to merits, the defendants file affidavits to shew that the plaintiff overcharges for the goods, and failed to supply more satisfactory proof when called for, as stated in the seventh plea.

MACAULAY, C. J., delivered the judgment of the court.

We think this rule should be discharged. We consider the circumstances quite as strong against the application as those in the case of *Williams v. Lee* (2 U. C. C. P. R. 157), *Wye v. Fisher* (3 B. & P. 443), 11 Ju. 370, 2 Dow. N. S. 101, 5 Scott N. R. 448, 15 Ju. 1197, *Twycross v. King* (6 Q. B. 663).

When the replication of *de injuria* was filed and served, the cause was at issue, according to our rules—Cam. Rules, p. 27–8, No. 19; and notice of trial was duly given. If after that, and after the cause was entered for trial, the defendants chose to demur to the replication to one of seven pleas, being under terms to accept short notice of trial, which they had accepted, we do not think it presents a case fairly within the spirit of the rule of Hilary Term, 13 Vic., No. 23, requiring the plaintiff to superadd notice of assessment of damages immediately on receipt of the demurrer. The demurrer was entered and the venire was altered on the record so as to include it; no regular notice of assessment could have been given of it, if it was to precede the assize

day; and to hold the present proceedings fatally irregular, would be to enable a defendant unreasonably to embarrass a plaintiff who had accepted pleas out of time upon an undertaking to go to trial at the ensuing assizes.

The damages were not to be investigated and assessed with a view to this demurrer exclusively; it is not like a demurrer to part of the declaration, a demurrer separating one part of the causes of action from another on the record; the same damages must have been and were equally assessed in relation to the issue in fact; and if the defendants, after having relied on special affirmative matter in their seventh plea, the truth of which the plaintiff denied, preferred demurring to the replication on very uncertain grounds, rather than prove and rely upon the facts, we do not see any good reason why they should not be bound by it.

All is right on the record, and we think the objection raised inconsistent with the fair interpretation of the terms and understanding on which the defendants were let in to plead—the pleas were issuable pleas, and the plaintiff took issue upon them; but a special demurrer is not within the rule requiring the pleas to be issuable, and a similar rule seems justly applicable to a special demurrer put in under the circumstances of this case. The defendants having had notice of trial, and filing and serving the demurrer after the assize day, and after the cause had been entered, must have known that the plaintiff was entitled to proceed to try the issues in fact, and at the same time to assess contingent damages as to the seventh plea—the defendants virtually had notice or were bound to take notice of this in the very nature of their own proceedings. Had the demurrer induced the plaintiff to refrain from going to trial, and he had countermanded it, it would have been a different thing.

As to the merits, we see no sufficient ground for interfering on that head. After the defendants voluntarily declined going into a defence on the issues of fact, with the facts set out in the seventh plea conceded to them by the plaintiff's joinder in demurrer, and on reference to the notes of the learned Chief Justice of the Queen's Bench, who tried the

cause, we see no reason to think the merits (as respects the quantity and value of the goods) were not with the plaintiff to the extent of the verdict rendered.

Rule nisi discharged, with costs to be costs in the cause.

DALE V. COOL AND HUGHES.

Division Court bailiff—Notice.

The bailiff of a Division Court, acting in the discharge of his duty as such bailiff, is entitled to notice of action under the division court acts, and that the objection is open to him under the plea of "not guilty per statute."

Writ issued 16th February, 1854; declaration, 11th April, 1854.

Trespass—*De bonis asportatis*. Pleas: by defendant Cool—Not guilty *per statute*, and not possessed; by defendant Hughes—1st, not guilty; 2nd, not possessed; 3rd and 4th, special pleas, justifying, under a Division Court execution, against the goods of one Egan, and alleging an assignment of the goods from Egan to the plaintiff fraudulent as against creditors.

At the trial the plaintiff gave *prima facie* evidence of a bill of sale duly registered. It appeared that after the assignment Egan departed, leaving his wife in the house where he had resided and kept tavern; that she remained there in possession of the house and goods for three or four weeks, and then left, going to the plaintiff's, shortly before the seizure. It appeared Cool had seized and sold the goods under, as alleged, an execution at Hughes's suit against Egan, being apparently indemnified by Hughes in so selling; but no execution or indemnity appears to have been regularly proved.

At the close of the plaintiff's case *Eccles*, for defendants, moved a nonsuit as to Cool, on the ground that he was entitled to notice of action as having acted in the execution of his duty as bailiff under the Division Court Act; and as to Hughes, because he was not proved to have directed or acted in the alleged trespass to plaintiff's goods. As to

Hughes, it was left to the jury, who found a verdict in his favor on the plea of not guilty, and for plaintiff seemingly on the other issues. They found against Cool £65 damages, with leave reserved to move a nonsuit if entitled to notice of action. The jury found that he acted in the execution of his duty as bailiff.

During this term *Eccles* obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved.

Durand shewed cause, and contended that the 14 & 15 Vic. c. 24, applies to bailiffs as well as justices of the peace; that this execution being against Cool, the bailiff had no right to seize plaintiff's goods; that Cool could have had the title to the property tried under the provisions of the statute; that Cool was not acting *bonâ fide*, and therefore not entitled to notice; and that, although the verdict was in favor of Hughes, if a new trial is granted it should be as to both parties.

Eccles, in reply, contended that there is no difference between the statute 13 & 14 Vic. c. 13, sec. 107, and the one which preceded it as to requiring notice of action; that the bailiff may plead the general issue, and give in evidence the want of notice; that the action should have been brought within six months, which has not been done—the plaintiff must therefore fail—*Timon v. Stubbs*, 1 U. C. Q. B. R. 347; *Sanderson v. Coleman*, 4 ib. 119;—that a bailiff, although he knows that the property is not the property of the execution debtor, still if he is ordered he must seize, and is entitled to notice—*Beechey v. Sides*, 9 B. & C. 806; *Cook v. Leonard*, 6 B. & C. 351; *Smith v. Hopper*, 9 Q. B. 1005; *Smith v. Regina*, 18 L. J. 301; *Cox v. Reid*, ib. 216;—that a new trial may be granted against one party—*Davis v. Moore*, 2 U. C. Q. B. R. 180.

MACAULAY, C. J.—The long-continued possession of Egan's wife, &c., constituted evidence sufficient to go to the jury in support of the *bonâ fides* of Cool's conduct if entitled to notice, assuming that the goods were really the plaintiff's property at the time, and this whether Cool was indemnified or not.

The indemnity might implicate Hughes, as adopting, if not directing, the seizure and sale for his benefit, without depriving Cool of his right to defend himself on any ground of defence open to him under the statute—*Timon v. Stubbs* (1 U. C. Q. B. R. 347), *Booth v. Clive* (10 C. B. 827); that defendant is entitled to notice *Jones v. Elliott* (11 U. C. Q. B. R. 30). On reference to the 13 & 14 Vic. c. 53, sec. 107, the 14 & 15 Vic. c. 54, sec. 5, and the 16 Vic. c. 177, sec. 7, it appears to me that the defendant was entitled to notice, and that the objection is open to him under the plea of not guilty per statute. It is clear he was acting under the statute sufficiently to entitle him to notice, and the last act expressly authorizes the objection under such plea—the case cited from 1 U. C. Q. B. R. 347 was before the last act.

I can see no good reason why, since the 16 Vic. c. 177, sec. 7, the defendant may not raise the objection under the general issue per statute, if he could not have done so before.

McLEAN, J., and RICHARDS, J., concurred.

Rule absolute.

HILARY TERM, 18 VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.

“ “ A. McLEAN, J.

“ “ WM. BUELL RICHARDS, J.

RANKIN V. THE GREAT WESTERN RAILWAY COMPANY.

The Great Western Railway Company is not authorized by the statute 4 Wm. IV. c. 29 to enter upon and assume lands, to be permanently appropriated to the uses of the railroad, without the permission first obtained of the owner, or by reference under the statutes.

The defendants requiring certain lands of plaintiff's for the purposes of their railroad, a sealed reference was entered into between the parties that the price or purchase money of the lands so required should be ascertained by arbitration. An award was accordingly made within the time limited by the reference, awarding that the price or purchase money should be £503 15s., to be paid by defendants to plaintiff within three months from the date of the award, on plaintiff's shewing a good title to, and executing and making free from incumbrances a proper and valid deed of conveyance of the land. The defendants entered into possession of the land under the reference, and with plaintiff's permission and assent, and built a portion of their works thereon with his knowledge; but he not being able to shew a good title to the land within the three months, there being a mortgage on part of the premises, the defendants did not pay the sum awarded, and the plaintiff, after the expiration of the three months, refused to abide by the award or accept the sum awarded, and brought this ejectment.

Held, that he could not treat the defendants as trespassers, and therefore the ejectment would not lie.

Writ issued 7th October, 1854. Ejectment for that part of lot No. 86, according to McNiff's survey, in the 1st concession, township of Sandwich, between the highway at the top of the bank of the Detroit river and the water's edge of the said river, and also the water lot in the Detroit river in front of the said lot No. 86, being now part of the village of Windsor in the county of Essex.

It appears in evidence that in March 1808 lot No. 86 was granted to Joseph Langlois, described as bounded in front by the water's edge, and the plaintiff deduced title from him through various mesne assignments, when his title seemed to be as follows:—The lot had descended from Pierre Santimore to his son Leander Santimore, his widow surviving and entitled to dower; that Leander Santimore had mortgaged it to Arthur J. Robertson to secure

£600; that on the 8th of July, 1850, Leander Santimore and his mother joined in conveying the lot to plaintiff,—the mortgage to Robertson being at the same time cancelled, and the amount due thereon deducted from the purchase money as between the plaintiff and Santimore, and secured to Robertson by a mortgage in fee from the plaintiff to him, which, though not produced, was admitted to bear date the 8th of July, 1850, with condition to be void on payment of £650, by instalments of £250 on the 1st of March, 1851, £250 on the 1st of March, 1852, and the residue on the 1st of March, 1853, of which £250 only was mentioned to be satisfied when the three months specified in the award expired, and all of which was paid and the mortgage discharged on the 21st of May, 1853.

The deed from Santimore and mother to plaintiff, of the 8th of July, 1850, in consideration of £1,000, conveying to him and heirs *eighty* acres, more or less, being the whole lot No. 86, subject nevertheless to the payment of a certain mortgage, given by the parties of the first part to Arthur J. Robertson, securing the payment of £650 and interest, as “upon reference to the said mortgage will more fully appear.” Deed registered the 7th of August, 1850. At that period Mercer, since deceased, was tenant in possession of the premises as tenant of Santimore; and afterwards he and Mrs. Mercer, his widow, remained possessed as tenants of the plaintiff’s until defendants took possession of the piece in question.

The water lot was granted to plaintiff by letters patent dated the 13th of June, 1853, as purchaser, described as water lot on Detroit river in front of lot No. 86. Though not granted until the 13th of June, 1853, the plaintiff had seemingly contracted for it before the submission and award hereinafter mentioned.

It appeared that the defendants, wishing the premises in question among others for the purposes of their railroad, sent Gunn, one of their engineers, to Windsor to make arrangements with the proprietors for obtaining their respective lands, having with him a plan shewing the proposed line of the railroad and the several tracts that

would be required, including the plaintiff's; that the plaintiff had advised some proprietors not to make difficulties, but to treat on reasonable terms, it being an object to get the terminus of defendants' road and the business station in the vicinity of their respective estates, and saying that as to himself he did not care what he got, deeming the increased value of his remaining lands as an object; that others arbitrated as well as the plaintiff; that by articles of agreement under the hand and seal of the plaintiff and the hand and seal of Gunn on behalf of defendants, dated the 13th of March, 1852, between the plaintiff of the one part, and the defendants, by Gunn their agent lawfully constituted of the other part (after reciting that plaintiff was the owner and occupier of a certain plot or parcel of land situate and being between the Queen's highway and the river Detroit, being part of lot No. 86 in the first concession of Sandwich, containing in front of the said river 403 feet, more or less, and extending back to the said highway, and that defendants were desirous of obtaining the same for the said railroad, and all plaintiff's interest therein and right and title thereto, as well as all his interest in and right and title, *if any he possessed* either at law or in equity, to the land in front thereof covered with water up to the edge of the channel in the said river Detroit, and which said land and interest said plaintiff was willing to dispose of and convey to the defendants for the purposes of the said railroad, for a depot and otherwise, but the said parties not being able to agree on the price or purchase money for the same, they had agreed to leave the same to be determined by arbitration as thereafter provided) it was agreed between the parties, plaintiff covenanting for self and heirs, and defendants for themselves and successors, &c., that the price or purchase money for the said plot or parcel of land, with the rights, privileges, members and appurtenances thereto belonging, should be left to the award, &c., of two named arbitrators and a third person to be elected by them by *ballot*, or the majority of them, provided they made their award in writing under their hands and seals, ready to be delivered to the party requiring

the same on or before the 29th March instant, and provided the names of the three arbitrators be endorsed on the said submission before they commenced the said arbitration, and provided also that each arbitrator be sworn before one of Her Majesty's justices of the peace well and truly to assess the damages between the parties according to the best of his judgment; and that in the said arbitration the said arbitrators should take into consideration the benefit conferred on plaintiff's property, as well as the damage done to any particular portion of it, if any, and that the said plaintiff will show a good and valid title to the said land, and will, on receipt of the purchase money to be ascertained and adjudged as aforesaid, execute and make unto the said defendants and successors a good and legal conveyance thereof, free from all charges and incumbrances whatsoever, &c.; and that defendants shall and will pay to the plaintiff, his heirs or assigns, the said price or purchase money of the said plot or parcel of land within three months from the time of the same being awarded, on having a proper conveyance of the said land made to them, but subject nevertheless to the proviso hereinafter lastly contained; also that the said submission may be made a rule of her Majesty's Court of Queen's Bench or Common Pleas at Toronto, subject to this proviso, that it shall and may be lawful for the said defendants to revoke, rescind, and make void the said submission and the award made in pursuance thereof any time within one month from the date and publication of the said award, on payment to plaintiff of the costs and charges incurred by him, &c. "And it is understood that these articles are made in pursuance of the charter or statutes in such case made and provided, and are not intended in any way to alter the position of parties under the said acts, but only to carry out fully the provisions of the said acts;" and lastly, that defendants should and would form and make four proper and suitable streets or carriage ways between Beman's Hotel in Windsor and lot No. 96. in front, allowing for the convenience of persons owning the intervening lots to have free access to and egress from the river Detroit aforesaid for water for all useful and necessary purposes.

That the two arbitrators appointed a third (named) in writing under their hands, the 15th March, 1852; on the 18th March, 1852, the three arbitrators signed a paper, stating that they awarded plaintiff to be paid by defendants for the land required by them across part of lot No. 86, containing 401 feet, more or less, from the north side of the travelled road to the water's edge, and from thence to the channel in the river Detroit, any interest he may have therein, the sum of £503 15s. By instrument under the hands and seals of the said three arbitrators, dated the 26th of March, 1852, after reciting the aforesaid submission, &c., they did award, &c., that the price or purchase money for the said plot or parcel of land, with its rights, members, and appurtenances, and of all plaintiff's interest therein and title thereto, and of all his interest, right, and title in and to the land in front thereof covered with water up to the edge of the channel in the said river Detroit, and of all the premises, is and shall be £503 15s., to be paid by defendants to plaintiff, &c., within three months from the date thereof, &c., at, &c., on the said plaintiff shewing a good title to, and executing and making, free from all dower and all incumbrances, a proper and valid deed of conveyance and assurance to the said plot or parcel of land, hereditaments, and premises, with the rights, members, and appurtenances thereunto belonging as aforesaid.

It further appeared in evidence that two or three weeks after such award was made the plaintiff called upon Colonel Prince, the defendants' solicitor, and said the money was an object to him, and asked if he could get the amount without waiting three months; that the existence of the mortgage being known, Colonel Prince told him he held a check for the amount, which he shewed to plaintiff or told him was upon a bank at Detroit, and said if he could make a title he (Prince) would recommend defendants to pay forthwith; that plaintiff made no objection to the check, and after much conversation Colonel Prince suggested that plaintiff's making a conveyance to defendants, and giving a bond to protect the title, and perfect it within a given time two months or so; that plaintiff gave no definite answer,

but said he (Prince) might prepare the bond, but he was not sure he could clear the title so soon ; whereupon Colonel Prince prepared a conveyance and bond (produced at the trial), and dated the 16th of April, 1852. The blank conveyance specified the front part of lot No. 86 as already described, and all the interest, right, and title of plaintiff in and to the land in front thereof covered with water, called the water lot, up to the edge of the channel of the said river Detroit,—said premises being better known and described on the defendants' plan of survey, &c. : it is declared to be a statute deed, but contained a covenant by plaintiff to defendants that he had a right to convey the said lands free from all incumbrances, and that he had done no act to incumber the same.

The bond was in the penal sum of £503 15s. ; in which, reciting the aforesaid conveyance of same date, and that the title remained to be completed by said plaintiff, the condition was that if he, heirs, &c., should within two months from date make out and deliver to John Prince, Esquire, for and on behalf of the said defendants, or to other their solicitor, a good title to the said lands and premises, free from all incumbrances, then the bond to be void, otherwise in force, &c.

That Colonel Prince being about to leave home, he left the conveyance, bond and check with Mr. Albert Prince, and the plaintiff was referred to him as authorized to arrange it. Mr. A. Prince stated that he had received the check with instructions not to deliver it over until the plaintiff's title was unincumbered ; that the plaintiff came to him, and was informed that the money could not be paid until the mortgage was cleared ; that the plaintiff replied he would not take the check, being on a bank in Detroit. This occurred within the three months from the date of the award ; and from what both Mr. Sheriff Baby and Mr. A. Prince said of the interview, it appeared that the plaintiff was given to understand that the money was ready for him whenever the mortgage was removed, but that it would not be paid until the title was clear. They do not seem to have said anything respecting the conveyance and bond

proposed by Colonel Prince being sufficient. No actual tender of the money was made within the three months, nor since ; that after the three months had expired the plaintiff entirely refused to accept the sum awarded or to abide by the award, but expressed his willingness to arbitrate *de novo*, and some overtures with that view were made. Before anything definite was closed, the defendants entered into possession, when or how not distinctly appearing, and established their works on the ground and water lot, and it was said part of the line of railroad now in operation crossed it. On the 31st of August last Colonel Prince, as solicitor of defendants, addressed a letter to the plaintiff's attorney, in which he says, if the plaintiff was advised he could not be compelled to arbitrate again, and that he could hold the land against the defendants, he thought he would find himself mistaken should he act upon it ; and that if he attempted to take possession of any part of the track, or to interfere with it or presume to impede the operations of the company in any way, he would be treated as a wilful trespasser, and be prosecuted accordingly, &c ; that had plaintiff been in a situation to make a good title and a valid conveyance to the company within the time prescribed by law after the latter took possession, he would have been paid long ago ; but he could not do either, because it turned out that no patent had ever been issued for the land, and that, moreover, there was a heavy mortgage upon it.

It was explained that the want of a good patent for lot No. 86 was stated under a misapprehension as to the fact. A question at one time arose whether the defendants' station should not be placed lower down the river than opposite the plaintiff, against which he remonstrated, and said he would have his remedy against the defendants if it was not established where it is. Another branch of the plaintiff's case was, that the defendants had taken land on the river side unnecessarily—more than the law entitled them to take ; and that the land in question was not necessary for the purposes of the railroad within the true intent and meaning of the Company's act of parliament. In sup-

port of this ground he called an engineer who had been in the defendants' employment. He produced a plan of the grounds and river occupied by the defendants, shewing where the railroad first struck the river, and how the line was extended from that point down the stream upon the margin of the river, and the land lying between the water's edge and the foot of the high bank until opposite the village of Windsor, the upper part of the front of which was cut off by it. He said it was 5,000 feet from where the defendants' works first touch the water's edge down the stream to where they terminate ; and he explained on the plan the extent to which the waters of the river had been encroached upon, and the nature of the ground changed by filling in, &c., in relation to the old water's edge ; that the upper side of the plaintiff's tract is 3,200 feet and the lower side 3,610 feet from the first point of contact with the river above ; that in front of plaintiff's it was wharfage 190 feet ; that where the line first struck the river, and for 1,500 feet along it, the works extend 40 feet into the water, and 150 feet at the distance of 600 feet above the plaintiff's lot. He also explained how, in his opinion, the terminus might have been much cheaper and better where the line first met the river than where it is lower down ; but he added that he spoke only as to engineering facilities, without including the consideration of the comparative advantages for business ; that he thought it more convenient as a public convenience where it is, but did not seem to consider the difference of situation of material importance for such objects.

On cross-examination he said he did not think the defendants required so large an extent of river frontage ; that the Michigan railroad, at the city of Detroit, nearly opposite Windsor, had not one-third of the distance taken by defendants. He also explained how he thought the river ought to have been approached with a view to the present terminus ; but as mere matter of opinion, his evidence was not received further than it was elicited on cross-examination or in reply thereto. It did not appear that the defendants were bound by law to file a plan defining the line of the route of the railroad before commencing the

work ; nor do the statutes contain any specific provisions as to the precise line to be adopted.

It was contended for the defendants—

1st. That the statutes 4 Wm. IV. c. 29, secs. 2, 3, 4, 5 & 7, and 16 Vic. c. 99, sec. 7, enable the defendants to hold the land for their railway purposes.

2nd. That the reference and award entitle them to do so, and estop the plaintiff—*Somerville v. Great West. Railway Co.*, 11 U. C. Q. B. R. 304.

3rd. That the defendants entered and became possessed with plaintiff's leave and license, and were entitled to a *demand of possession* before action brought.

4th. That the mortgage in fee stood in the way of the plaintiff's title, wherefore he was not able to convey nor entitled to receive the money awarded within the three months ; and that the defendants have always been ready and willing to pay the amount upon receiving a good title, as plaintiff well knew—16 Vic. c. 99, sec. 4.

That plaintiff has no right to set up general excess in the lands taken by defendants if not excessive as to his own, and that defendants were entitled to encroach upon the river front so far as convenient—6 Ex. R. 140 ; 16 Q. B. 597 ; 2 Phill. C. C. 649.

6th. That plaintiff's remedy is by action or suit for the amount awarded, and not ejectment to dispossess the defendants after their works are finished.

In reply, it was urged—1st. That the 16 Vic. c. 99, was passed since the three months expired from the date of the award, and could not affect the plaintiff's right, which had previously accrued.

2nd. That the statute only allows the defendants to go to the river Detroit, not upon it.

3rd. That the plaintiff cannot enforce an arbitration, but may resume possession ; that section 7 of 4 Wm. IV. c. 29 does not suspend section 3, and that both must be construed together.

4th. That the mortgage was immaterial ; that plaintiff was possessed ; that defendants took the lands from him

and arbitrated with him, and could not afterwards set up the mortgage as an obstacle.

5th. That Colonel Prince's letter shewed the plaintiff's will to a continuance of possession at an end, and put an end to any tenancy at will or permissive occupation that might have existed.

6th. That the act does not enable defendants to enter without a previous agreement or reference—12 U. C. Q. B. R. 59; 3 U. C. C. P. 305.

The learned judge who tried the cause (*Macaulay, C. J. C. P.*) said he thought plaintiff entitled to recover, as to the water lot on his patent and as to the lot No. 86, by virtue of his title, the mortgage having been displaced by him before action brought; that when the three months expired he could not give a good title, nor was the money paid or tendered, wherefore it seemed a naked case of possession taken by defendants of plaintiff's land without compensation; and that they could not hold it without paying for it.

That he did not think plaintiff could set up encroachments upon the lands of others to shew excess, or that it was unnecessary to take his own; and that excess as to his land was not proved.

That the defendants might run their line along the water's edge of the Detroit river, as represented in evidence, and encroach upon the water and land below the bank for that purpose, if the navigation was not impeded, and no public nuisance of that kind committed thereby.

Moreover, that plaintiff's submission to arbitration conceded their right to the lands on the terms of compensation under the statute; but the award having failed or fallen through, he thought the plaintiff entitled to resume possession in the absence of any existing steps under the statutes enabling the defendants to retain possession; that the submission and award did not confer or constitute a legal title; that between two private individuals they would not bar an ejectment; and that unless the defendants were entitled to hold possession on other grounds by virtue of the statutes (see 16 Vic. c. 99, sec. 6), which he did not see, the plaintiff seemed entitled to prevail.

That if the submission implied assent to the defendants' entry, there was nothing to continue after the three months had expired; and Colonel Prince's letter put an end to it if it existed, unless plaintiff was estopped by reason of the railroad having been actually laid and works erected upon his land and water lot.

That defendants, as being ready and willing to pay on receiving a good title, may have been entitled to an action against the plaintiff on the submission, considering its terms, or might be enabled to obtain a decree of specific performance in equity, as having been always prompt, eager, and ready; and that so far the submission, notwithstanding the proviso referring to the arbitration clauses of the statutes, may contain a contract between the parties, apart from the statute, and still executory; but that, in an action of ejectment at law, it depended upon the proof of legal title and right to possession. The jury found for the plaintiff, with one shilling damages.

In the following term (Michaelmas Term, 18 Vic.) *Becher*, for the defendants, obtained a rule on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, without costs, on the grounds of misdirection, and as being contrary to law and evidence.

Cooper and *Connor*, Jr., shewed cause, and referred to the 4 Wm. IV. c. 29, secs. 2, 3, 4, 5 & 11, and contended that no previous bargain had been shewn before defendants' entry, and that no payment or tender of the money awarded was made afterwards. That the 16 Vic. c. 99, sec. 7, conferred no title to the land, and was not retrospective; that the rights of the parties depended upon and must be judged of by the law at the time of action brought. That the defendants could not carry their road along the margin of the river Detroit as they had done, wherefore there was no necessity for the plaintiff's land being taken at all, as shewn by the distance between it and the place where defendants' line struck the river. That the 4 Wm. IV. c. 29, sec. 7, did not vest a title to the lands in defendants, and that section 4 authorized plaintiff to resume possession. That defendants only could promote an arbitration, and

plaintiff had no remedy but by ejectment. That the submission should not have been worded as it is, but should have been restricted to the terms of the statutes as a statutory reference only; at all events, that the proviso incorporated in it, with reference to the statutes, limited it to that effect; that the case of *Abraham and Story v. The Great Northern Railway*, 16 Q. B. 597, did not authorize the detention; and that if the right was doubtful, the court should lean in favor of the plaintiff, whose private right was infringed—*Weyman v. The Munster Co.*, 1 *Railway Cases*, 596, 599. That the plaintiff was not bound to make a perfect title to entitle him to the sum awarded. That the defendants knew the state of his title, and arbitrated for his rights without treating it as the case of mortgaged or ungranted lands, and should have tendered the money at the peril of plaintiff's being entitled to resume possession under the 4 Wm. IV. c. 29—*Scales v. Pickering*, 4 Bing. 448. That it was not necessary to extend the defendants' works along the river, as they had done; and the act only authorized them to run to the river, and not into and along it—*Dougall v. The S. & W. Railroad Co.*, 12 U. C. Q. B. R. 59; *Reg. v. Meyers*, 2 U. C. C. P. R. 365. That there is no real conflict between sections 4 and 7 of the 4 Wm. IV. c. 29, and ejectment will lie. That excess in the quantities taken from other proprietors might be proved in order to shew that there was no necessity for their taking the plaintiff's, to rebut the argument of convenience—*Mitchell v. Harris*, 12 Mod. 513; *Rex v. Croker*, 1 Cow. 26; 3 Eng. Rep. 64. That plaintiff might shew more of his land below the bank taken and possessed by defendants than was necessary for railroad uses and purposes—*Dwarris on the Statutes*, 784-5. That the 16 Vic. c. 99, sec. 4, as to the right to encroach upon the river, does not govern but the defendants' act—4 Wm. IV. c. 29, sec. 5; 16 Vic. c. 179, sec. 8.

Becher and *Dr. Connor*, Q. C., in reply, contended that the defendants entered with the plaintiff's consent, and improved largely under his eye, and he should be held estopped. That "to the river" means to the river in the

sense in which the river side was to form the navigable waters at the west end of the defendants' terminus or railroad, and authorized the works to be extended out into and along the river so far as necessary or convenient, and that there was no proof to the contrary—5 Railway Ca. 587; 2 Phill. C. C. 649; 6 Railway Ca. 779; 6 Ex. R. 143; Shelford on Railways. Moreover, that plaintiff was estopped from now setting up the want of necessity or legal right to take the land after having acquiesced therein by the arbitration, however abortive; and that plaintiff called and used both the submission and award; and that the 16 Vic. c. 99 authorized the defendants to encroach upon the river. That the plaintiff's position was that of mortgagor, and he was not entitled to the money, but the mortgagee; that defendants' were ready and willing to pay if plaintiff made them a good title, which he never had nor offered to do; also, that defendants offered to waive the objection to the title upon receiving plaintiff's bond, of which he did not avail himself, wherefore the arbitration has thus far failed through plaintiff's default exclusively, and he cannot now avail himself of his own wrong to dispossess defendants, and so stop the use of their railroad. That plaintiff not being prepared with a good title within the three months, could not demand the money, and could only become entitled thereto by afterwards perfecting it and then demanding payment; that in the meantime the award was a title, authorized possession; and that defendants were not liable to be treated as trespassers in ejectment; and that the defendants had a possessory title against plaintiff—Rolph v. O. S. & H. R. Road Co., 9 U. C. R. 326. That it was resolved into case of special agreement by the terms of the submission, and is without the statute. That the proviso incorporated or included the statute, but did not restrict or abridge other portions of the agreement. That defendants might have paid the amount awarded into court, which shews their right to hold the land—16 Q. B. 526–597, 796, in principle apply. That plaintiff having let defendants in, and defendants' money having been expended, and the work being done since, he cannot eject them, though the amount of the

award not paid in the three months, a period elapsed before the 16 Vic. c. 99 was passed. That the mortgage was not removed till April 1853, nor the water lot granted till May 1853,—both after the expiration of the three months.

As to defendants' right to enter and take lands, reference was made to 4 Wm. IV. c. 29, secs. 2, 3, 4, 5, 9 & 11; 9 Vic. c. 81, preamble, and secs. 13, 26, 27, 28, 29 & 30; 16 Vic. c. 99, secs. 5, 6 & 9; 16 Vic. c. 169, secs. 8 & 9. That the *line of road* did not encroach on the fee simple, or plaintiff's private rights, as distinguished from the public rights in the river in front of plaintiff's lot. That the submission was relied upon in its special terms; and that as soon as entered into by plaintiff defendants' right of entry accrued, and could not be revoked—16 Q. B. 957; and that the award is conclusive. That by 4 Wm. IV. c. 29, sec. 3, defendants might buy of the owners of the land and compensate occupiers, and if either unwilling or unable to treat, defendants, might appoint, &c., and take and appropriate, &c. That plaintiff had no right to the money as owner or mortgagor until his title was cleared, and then only to a conveyance of and not to resume possession of the land.

Defendants relied on section 5, as enabling them to take and hold possession.

Plaintiff's counsel remarked that the submission could not operate as an estoppel, defendants not being reciprocally bound therein to pay at all events, and not having become a party by the corporation seal duly affixed thereto.

MACAULAY, C. J.—I think the rule should be made absolute. The first question that presents itself is, whether the defendants were by the statutes empowered to enter into and retain permanent possession of plaintiff's land without agreement for the price or arbitrament.

It appears to me that the 4 Wm. IV. c. 29 authorizes the defendants to make use of the lands of private individuals on the line of the route of the railroad—first, by permanently assuming them, to form portions of the line of road, stations, &c.; secondly, temporarily, for working grounds

in making the railroad, or partially, in taking timber, earth, &c., off the same for the purposes of the road; that they have a right to enter, to make surveys, and set out and ascertain the lands they shall think necessary and proper for the railroad, or to enter lands not so required, but convenient to be made a temporary use of, or to be partially taken or incumbered without previous contract with the owners, and without previous payment or arbitrament respecting the same; but that they have not the right to enter upon and assume lands, to be permanently appropriated to the uses of the railroad, without the permission first had and obtained either by consent of the owners thereof, or by virtue of reference authorized by the statute. The application of real estate to such purposes I consider interfering with and encroaching upon the fee simple or right, or private easement, as the case may be. I do not consider that the word "now" in the 11th section of the 4 Wm. IV. c. 29, revived by the 8 Vic. c. 86, is to be restricted to the persons then holding and enjoying; but rather that it means the owners or persons holding and enjoying for the time being—*Bishop v. North* (11 M. & W. 418), *Farlow v. The Hungerford Railway Co.* (2 B. & Adol. 341), *Rex v. The Hungerford Market Co.* (4 ib. 592).

I think the above is the proper construction to place upon the several clauses of the statutes taken together,—such as the 4 Wm. IV. c. 29; 5 Haw. 3; the 9 Vic. c. 81, secs. 26, 27, and 30; and the 16 Vic. c. 99, secs. 5, 6 and 7. I adopt the foregoing opinion in reference to the language, scope, and objects of the statutes, and upon the authority of the following cases, which shew, I think, that parliamentary powers of this kind are to be strictly pursued; and that, unless unequivocally expressed, it is not to be intended that the legislature meant to authorize the defendants to deprive the owners of their lands without compensation, or previously providing therefor, when the land was to be permanently taken and the value was capable of being at once ascertained; and that other interference and encroachments were excepted rather from the difficulty of ascertaining the dangers in the outset, than an intention to expose proprietors to the discretion of the

defendants in the use to be made of their property, and leaving them to rely on the solvency of the company to render compensation after the damage had been sustained. The several statutes to which the cases relate differ in their language, and sometimes in their import, both in England and here; but as applied to the present question I think they are substantially alike, and that the just rule to be derived from them is what I have already expressed—*Boyfield v. Porter* (13 East. 200), *Lister v. Farrer* (7 A. & E. 124). Then the statute 5 Wm. IV. c. 36, local, formerly public (sec. 25), authorized and empowered trustees, &c., for making, amending, altering, improving, and keeping in repair a certain road, “to enter upon, take, and use lands upon, over, or through which the line of the said road is laid down or described in a certain map, plan, &c., *making* or *tendering* satisfaction to the owners and proprietors of all private lands so taken or used for the same, or for any loss or damage they may sustain thereby;” and it was held they were *not bound* to make or tender compensation *before* or *at the time* of entering upon or taking the lands, &c.—*Johnson v. The O. S. & H. Railway Co.* (11 U. C. Q. B. R. 246–7), *Reg. v. The Eastern, &c., Railway Co.* (2 Q. B. 347; S. C., 1 G. & D. 589), *Lord Harborough v. Shardlow* (7 M. & W. 87), *Robins v. The Warwick Canal Co.* (2 Bing. N. S. 483), *Turner v. The Sheffield and Rotherham Railway Co.* (10 M. & W. 425), *Stracey v. Nelson* (12 M. & W. 535), *Peters v. Clarson* (8 Scott N. R. 384; S. C., 8 Ju. 648), *Dimes v. The Grand Junction Canal Co.* (9 Q. B. 469), under the statute 33 Geo. III. c. 80, sec. 25, which resembles our act of 16 Vic. c. 99, sec. 6. At page 497, *Pollock, C. B.*, remarks that, according to the provisions usual in modern statutes, possession cannot be taken till payment of compensation; at page 508, that in default ejectment will lie (see 1 M. & Sel. 33–34); at page 509, *Tindal, C. J.*, that the price must be paid before entry.

In *Ramsden v. The Manchester Railway Co.* (1 Ex. R. 723) it was held that under the Lands Clauses Consolidation Act, 8 & 9 Vic. c. 18, sec. 84, compensation should be made before entry, when the land is permanently taken;

see, also, the Imp. Stat. 8 & 9 Vic. c. 20, therein referred to. —Doe d. Hudson v. The Leeds, &c., Railway Co. (16 Q. B. 796-7; S. C., 15 Ju. 946, and 4 Eng. Rep. 283), under the 7 & 8 Vic. c. 59, secs. 137, 153, 158; Doe d. Armitstead v. The North Stafford, &c., Railway Co. (16 Q. B. 526; S. C., 4 Eng. R. 216), Sommerville v. The Great Western Railway Co. (11 U. C. Q. B. R. 304), where the distinction between permanent and temporary occupancy is noticed and relied upon,—this case should be read in connection with the case of Johnson v. The O. S. & H. Railway Co., reported in the same volume and mentioned above.

Second. I think that the defendants' railroad does interfere with and encroach upon the fee of the land sought to be recovered in this action, and, consequently, that the defendants were not at liberty so to interfere and encroach without the consent of the owner thereof, or by virtue of a reference according to the statute 4 Wm. IV. c. 29, sec. 11.

It was not left as a separate or distinct question to the jury whether the defendants so entered, or whether they entered with the plaintiff's consent or not; but it appears to me the inevitable inference from the evidence throughout that he did, in the first instance, assent to and acquiesce in their entering upon and taking possession of the premises for the purposes of permanently appropriating it to their own use and of laying the railroad and appendages thereon; and that they so entered in the year 1852, pending the reference, if not before.

The 11th section above mentioned speaks of *permission* first had and obtained, *either* by consent of the owner or by virtue of reference. Now a distinct written *permission* containing the plaintiff's *consent* was not shewn; and it may be said that when the fee simple, right or private easement is to be interfered with or encroached upon, a written consent at least should be obtained and given, and that a mere parol or verbal assent would not suffice. I think, however, that in this case there was sufficient proof that the defendants had permission to enter both by the plaintiff's consent by parol, and by inference from the transactions in writing that took place, and also by virtue of the

mutual reference, which gave implied license to enter in the true spirit and meaning of the statutes and of the parties. The mutual reference involves a consent or authority to the defendants' entering subject thereto: I take that to be the true intent and meaning of the statutes. Then the defendants having entered with the plaintiff's consent, and by virtue of reference, and built their railroad and other works thereon with his knowledge, the next consideration is, whether the plaintiff can now, after the works have been completed, revoke the license thus conferred on the defendants—firstly, by the plaintiff himself, and partly by operation of law—and I have arrived at the conclusion that he cannot.

At common law, and irrespective of the statutes and the inferences to be drawn from their scope and objects, I consider it clear that a submission and award cannot operate as a conveyance to transfer an estate from one person to another; but I think they may control the possession as between the parties, and be thus made the foundation of supporting or resisting an action of ejectment—*Kent v. Elstob* (3 East. 15), *Hunter v. Rice* (15 East. 100), *Thorpe v. Eyre* (1 A. & E. 926), *Farrar v. Billing* (2 B. & A. 171), *Greathead v. Morley* (3 M. & G. 139); and as to the effect of a covenant for quiet enjoyment—*Weakly v. Bucknell* (Cow. 473), doubted in 2 T. R. 739-44—*Goodtitle v. Bailey* (Cow. 597, 4 Bur. 2209).

The effect thereof, under acts of parliament like those now before us, is enhanced. Among a variety of cases reference may be made to *Bymen v. The Thames Haven Dock Co.* (2 Ex. R. 549; S. C., in error, 5 ib. 696), *Pilgrim v. The Southampton Railway Co.* (7 C. B. 205), *The Great Western Railroad Co. v. Baby* (12 U. C. Q. B. R. 106), *Doe d. Armitstead v. The North Staffordshire Railway Co.* (16 Q. B. 526), *Hudson v. The Leeds, &c., Railway Co.* (16 Q. B. 796; S. C., 15 Jur. 946).

The last I consider quite in point. In that case the defendants were empowered by their special act (prior to the Lands Clauses Consolidation Act, 8 & 9 Vic. c. 18, 1845)—namely, the 7 & 8 Vic. c. (LIX.) 59—to purchase

lands by agreement or on assessment of the value as therein provided ; if the land owners refused to accept the sum agreed upon or awarded, the Company might deposit it in the bank, &c. ; after which, but not before, they might enter upon and take the lands. The defendants requiring certain lands of Hudson's, but the extent of possible injury to his property not being ascertainable beforehand, it was agreed and covenanted between them that the amount of compensation to be paid to him by the Company for the privileges therein mentioned should be referred to arbitration to two persons named, or, in case of disagreement, to an umpire, to ascertain and fix the amount of compensation to be paid to him by the said Company in respect of, first, a piece of land ; second, the permanent damage (if any) done to certain mills ; and, third, any other damage, temporary or permanent : that Hudson should make a good title to the land, &c. ; and that the Company should be at liberty to take possession of the piece of land, and to proceed with their works immediately, &c.

The defendants were let into possession immediately after signing the agreement, and afterwards began their works on the land. Owing to some delay, the award was not made in due time, and the time was extended by a second agreement apparently to a period when the works affecting the matters in difference should be completed. The defendants erected a tank on other lands, which gave rise to a new claim by Hudson, owing to which a new clause was added to the agreement of reference. The parties afterwards went before the arbitrators, and finally an award was made by the umpire adjudging the payment of certain sums to Hudson for the value of the property, damages, &c. In settling the conveyances, the parties differed as to the operation of the award in certain respects, when Hudson claimed to have his land restored to him, and brought that ejectment.

Campbell, J., on the authority of *Doe d. Armitstead v. The North Staffordshire Railway Co.* (16 Q. B. 796), ruled at the trial that, the Company having entered lawfully, and nothing having occurred to make their possession

unlawful, Hudson was not entitled to treat them as trespassers, and that the action did not lie ; but leave was reserved to move to enter a verdict for plaintiff. A motion was made accordingly, and a rule was refused.

In the course of the argument of plaintiff's counsel, Lord *Campbell*, C. J., said they (defendants) may not have the absolute legal estates, and yet may not be trespassers ; and that the counsel was obliged to contend that the company never had more than a tenancy at will, and asked, could Hudson have treated them as trespassers during the arbitration. In refusing the rule he said that under the special act the defendants had a right, by certain proceedings, to obtain the property in the land ; that instead of those proceedings being taken, the parties agreed to a reference, and in the meantime the lessor of the plaintiff covenanted that the defendants should have possession ; that they took possession and laid out money on the land ; and that, under those circumstances, the plaintiff's counsel was obliged to contend that they were merely tenants at will, and liable to be told at any time that their license was revoked ; that he (Lord Campbell) was clearly of opinion that was not the intention of the parties ; and that the company did not suppose they could be converted into trespassers at any moment ; and that there was no hardship on the lessor of the plaintiff in that view of the case, for he had a remedy as effectual by proceeding on the award, as was given in *Doe d. Armitstead v. North Staffordshire R. W. Co.*, ante.

Patteson, J., was of the same opinion, and said that under the special act the company had power to take the land compulsorily, making compensation, but were not to enter upon it before payment or deposit of the purchase or compensation money, unless by consent of the land owner ; that they did enter with such consent—then nothing remained but to have the compensation settled in a proper course ; that it did not follow, because the company had entered by consent and not compulsorily, that the land owner, upon some dissatisfaction, might turn them off the land as trespassers ; and that to decide so would give a great opening to oppression, though he did not say that any was intended in that case.

I have stated this case fully because of the close resemblance it bears to the present, and in order to shew the particulars in which the two cases differ.

When, on reference to the 4 Wm. IV. c. 29, sec. 3, we find it provided that the arbitrators are to adjudge and determine such matters and things as should be submitted to their consideration by the parties interested, then what was submitted on the occasion in question? It was known on the 13th of March, 1852, that the plaintiff's lot, No. 86, was mortgaged, and that he had not a perfect title to all the land covered with water which is mentioned in the submission of that date; at all events, it was known before the three months expired after the award of the 29th of March was made. The submission recites that the plaintiff was owner and occupier of that part of lot No. 86 which is now in controversy, and that defendants were desirous of obtaining the same for the railway, and all his right, title, and interest, as well as all his right, title, and interest (if any) he possessed in law or equity to the land in front covered with water to the edge of the channel in the river Detroit,—meaning the main or mid-channel of the river. Plaintiff at that time was owner of lot No. 86, subject only to the mortgage, and was the occupier in fact; he was also equitably interested in the water lot in front thereof, though not so far as the channel bank of the river.

The submission further recites that the plaintiff was willing to sell, and dispose of, and convey such land and interest to the defendants, for the purposes of such railroad, as a depôt or otherwise; but not being able to agree upon the price or purchase money, the parties had agreed to refer the same to arbitration. It was then agreed that the price or purchase money for the said plot of land, with the rights, privileges, and appurtenances, should be left to arbitrators as therein provided; and the plaintiff covenanted to shew a good and valid title to the said land, and that he would, on receipt of the purchase money, to be ascertained as aforesaid, execute and make to the defendants a good and legal conveyance thereof, free from all charges and incumbrances whatsoever,—the defendants agreeing to pay the

said purchase money within three months after the making of the award on having a proper conveyance of the said land made to them ; but subject to the proviso afterwards contained therein, that those articles were made in pursuance of the statutes, and were not intended in any way to alter the position of parties under the said acts, with power to the defendants to revoke the submission and award within one month after the date and publication of the award. The proviso in reference to the statutes operates in the defendants' favor as well as in the plaintiff's, and shews that, except in so far as otherwise agreed, both parties were to be specially bound and governed thereby. The submission also shews that the plaintiff was dealt with as absolute owner of the front part of lot No. 86, and not merely as a mortgagor in possession, and he specially undertook to give a good title in fee to all the land for which he was to be allowed compensation or purchase money.

The award afterwards made in due time following the submission determined the price at £503 15s., to be paid within three months from the date thereof, on the plaintiff shewing a good title and making and executing, free from all incumbrances and all dower, a proper and valid deed of conveyance, &c. ; consequently the defendants entered and held under a reference per statute and the special provisions contained in the submission and award. Then it is said that if so, the defendants, having treated the plaintiff as owner, were bound to pay the price awarded within three months ; and that having failed to do so, he is at liberty to resume possession. To this it is replied, it might have been so in the absence of special provisions, but that they shew the defendants were not to be bound to pay the purchase money at all events and unconditionally, but that the sum allowed being the estimated price of the fee simple, they were only bound to pay the same on receiving concurrently a valid title in fee, which the plaintiff was not in a condition to make when the three months expired ; also, that, notwithstanding his default at the day, the defendants have ever since been, and still are, ready and willing and eager to pay the same on receiving such a title as the plaintiff

undertook, and is now, by his own shewing, able to give them. To this the plaintiff would say, that the defendants should have taken the title he could give at the end of the three months, and relied upon his covenant to protect the title; and that not having done so, and the day having elapsed, the plaintiff has now no legal remedy to compel payment under the award, though he were now to make or tender a perfect title, and is without remedy if not entitled to the one sought in this action. To that the defendants would say, the plaintiff did not offer to make any conveyance at the day, and that if time be of the essence of the contract at law, which is a question, it is not so in equity; and that if the plaintiff cannot compel payment of the purchase money by legal suit under the award, it does not follow that he cannot do so by bill in equity, as the defendants might probably compel specific performance on his part, being now satisfied with and willing to accept the title he can give, and having throughout been eager and ready. Moreover, that the plaintiff may have some other legal remedy, by mandamus or otherwise, if he cannot enforce the award by action—*Reg. v. The Hungerford Market Co.* (4 B. & Ad. 327)—that the defendants could not recede;—and see 12 Q. B. 776, and *Doe d. Armitstead v. The North Stafford Railway Co.*, ante.

It appears to me the weight of such arguments is in the defendants' favor, and that the plaintiff, by failing to shew a good and valid title at the day, cannot take advantage of his own default to repudiate the award, although the defendants are willing and desirous to abide by it, or that he can place himself in a better position than if he had a good title all the time, and yet neglected or refused to shew it.

The present is distinguishable from the cases cited on this point, but I cannot say it affects the principle of those decisions as applicable to this action. I think that under the statute and reference, and plaintiff's words and conduct, it must be taken that the defendants were lawfully in possession originally, and not liable to be ejected within the three months, nor afterwards, until the plaintiff shall take

such steps as shall place them in the wrong, and so entitle himself to resume possession.

I do not think the defendants' omission to pay at the end of three months does, under the circumstances, place them in default or in the wrong, not being then bound to pay except *sub modo*; and that nothing has since occurred to make them wrong-doers by commission or omission, or to entitle the plaintiff to treat them as trespassers upon his lands, which is the principle of the action of ejectment.

Admitting that time was material, I think that the plaintiff, not being ready with a good title at the end of the three months, should have afterwards offered to go on, or tendered a conveyance when his title became disencumbered and perfect. Had he done so, and the defendants then refused to accept a conveyance or to pay the sum awarded, I should suppose this action might be maintained under the 4 Wm. IV. ch. 29, sec. 4, except in so far as the plaintiff was liable to be controlled by the steps taken under the subsequent acts, 9 Vic. ch. 81 and 16 Vic. ch. 99.

Until the mortgage was displaced as to lot No. 86, and the government patent obtained for the water lot, the defendants were liable to be met by such cases as *Leslie v. Farren* (7 A. & E. 124), and *Johnson v. The O. S. & H. Railroad Co.* (11 U. C. Q. B. R. 246), or the rights of the crown under the statutes which protect the crown lands—See 9 Vic. ch. 81, sec. 29, &c.

On the whole, therefore, I am of opinion that this action is not maintainable under the facts in evidence.

As to how far it was necessary for the defendants to take the lands in question, the act authorizes them to take such lands as they think necessary and proper; and I see no reason to doubt their right to take those in question: they are actually appropriated to the immediate uses and objects of the railroad, and the quantity is not excessive.

If a strong case, evincing sinister objects, were made out, it might, and I think would and ought to form a question for the courts and jury; but no such case is made or suggested to my satisfaction. It cannot be denied that the defendants were empowered to come to the river Detroit

and establish their terminus where it is. Had they come directly down from the interior of the country to the town of Windsor and placed their terminus where it is, and covered the *locus in quo* with their works just as they are covered, I do not understand that their right to do so would be denied or could be controverted.

The objection taken is, that they are only entitled to go to the river, and that wherever they choose to strike it they are bound to stop and establish their terminus and business depôt, &c.; and that they cannot run the line of railway along the margin of the stream, or monopolize or encroach upon any of the waters of the river.

If it be a public nuisance to do so, it is one thing; it is another thing to dispute it in an action like this. That it is not a public nuisance, but legally authorized, I think the statute 16 Vic. ch. 99 so clearly shews that I cannot entertain doubt upon the subject; and as to private individuals, if the defendants on reasonable grounds deem it more convenient to strike the river Detroit where the railroad does, and then to descend on the level of the water to Windsor, instead of arriving at the same point along the main land above the high bank, and if they deem it expedient to establish their western terminus where it is, I perceive no law against it, nor any private right thereby illegally infringed, if due compensation be made as the acts provide.

At the same time, though the defendants have a very wide discretion, I do not think they possess arbitrary powers to take any quantity of lands, and wherever they please, without control or restriction. On the contrary, I think their encroachments might be of that excessive and unreasonable nature as to repel *bona fides*, and shew sinister and improper objects in contemplation by them; in which event the law, through the courts of justice, might and would control them. Cases relevant to this point are—*Philips v. Redpath* (Draper 72), *Boyfield v. Porter* (13 East. 205), 2 Blk. Rep. 924, 3 Wil. 461, *The Cast-plate Manufacturers v. Meredith* (4 T. R. 794), *Sadd v. The Maldon Railway Co.* (6 Ex. Rep. 143), *Newbold v. Coltman* (6 ib. 198), 2 Phill. C. C. 474, 1 M. & G. 112, *Doe dem.*

Armitstead (16 Q. B. 526), Lord Oakley v. The Kensington Canal Co. (5 B. & Adol. 138), The Attorney General v. The Eastern Counties Railway Co. (10 M. & W. 263), Bell v. The Hull & Selby Railway Co. (6 M. & W. 699).

I think the cases shew that, notwithstanding the discretionary powers conferred upon the defendants, a case of palpable abuse or *mala fides* in the exercise of those powers might be shewn; but I do not think it shewn on the facts before us.

In reference to the case cited—of Dougall v. The Sandwich and Windsor Road Co. (12 U. C. Q. B. R. 59)—I will only observe that it does not necessarily follow that the terminus of a highway leading from one place to another, and a railroad like that of the defendants leading from the Niagara river to the river Detroit, mean the same thing, or are to be treated as coming under the same rule to the river, as a railroad terminus in the nature of the objects and business contemplated must mean more than merely touching it. How much more, is a question of degree depending upon the peculiar circumstances attending the course; but it is not, in my view of the subject, necessary to dwell upon this point, or to go into the law of water carriers, to shew the force and effect that may be given to the words “to the river Detroit” as justifying the defendants in extending their works beyond the margin or water’s edge of such river.

McLEAN, J., and RICHARDS, J., concurred.

Rule absolute.

JANNETTE V. THE GREAT WESTERN RAILWAY COMPANY.

The Great Western Railway Company are not entitled to enter upon the lands owned and possessed by a person, with the intention of permanently appropriating them for the purposes of their railroad, without the owner’s permission or reference under the statute; and that defendants, having entered upon the plaintiff’s land, in defiance of him, for the purpose of permanently appropriating it, though such intention was afterwards abandoned, are liable in an action of trespass *quare clausum fregit*.

A plaintiff is not bound by the inadvertent statement or admission of his counsel in opening his case, such statement being promptly retracted by the attorney and counsel.

Writ issued the 28th of August, 1854. Trespass *quare clausum fregit*.

First count states that defendants, on the 1st of October, 1853, and on divers, &c., between, &c., *vi et armis*, broke and entered a close of plaintiff's covered with water, being in that part of the Detroit river in front of lot No. 77, 1st concession, township of Sandwich, and then being part of the village of Windsor—bounded as therein described—and drove piles therein.

Second count—Trespass to a close similarly described, and laying logs, piles, timber, &c., thereon, and upon a wharf of plaintiff's there situate.

Third count—Trespass to a close of plaintiff's, being part of lot No. 77, 1st concession, township of Sandwich, bounded on the north by the river Detroit, south by the public highway leading through the village of Windsor, and on the east and west by other portions of said lot 77; destroying fruit trees, pear trees and others.

Fourth count—Trespass to a close similarly described, and digging up and removing the soil, &c.

Fifth count—Trespass to another water lot or close of plaintiff's, in the village of Windsor, abutted towards the north on the channel bank of the river Detroit, &c., described as in front of part of said lot No. 77.

Pleas.—First—Not guilty, to the whole.

Second—By leave and license of plaintiff first given the trespasses were committed.

Third to first count—Not plaintiff's close.

Fourth to first count—Defendants entered by permission of plaintiff.

Fifth to first count—Authority to enter under the statutes incorporating defendants—that defendants entered to make and construct a railroad thereon, said close being requisite and necessary to be taken for that purpose, doing as little damage, &c.

Sixth to second count—Not plaintiff's close.

Seventh to second count—Defendants entered by plaintiff's permission.

Eighth to second count—Similar to fifth plea to first count.

Ninth to third count—Not plaintiff's close.

Tenth to third count—Entered by plaintiff's permission.

Eleventh to third count—Similar to fifth and eighth pleas.

Twelfth, thirteenth, and fourteenth to fourth count—Similar to ninth, tenth and eleventh pleas to the third count.

Fifteenth, sixteenth and seventeenth to fifth count—Similar to ninth, tenth and eleventh pleas to the third count.

Replications—Similiter to first, third, sixth, twelfth and fifteenth pleas.

To second plea,—*De injuria*, without the leave and license of the plaintiff.

To fourth, seventh, tenth, thirteenth and sixteenth,—*De injuria*, without permission of plaintiff.

To fifth, eighth, eleventh, fourteenth and seventeenth,—*De injuria*, and issues.

At the trial, the plaintiff's counsel, in opening the case, apparently in anticipation of the defence under the pleas of leave and license, read from his brief what he alleged to be the terms of an agreement entered into between the plaintiff and defendants for the cession of the premises in question to defendants for their railroad on certain specified terms, and which terms he contended had not been complied with on the defendants' part, wherefore it had ceased to be binding upon the plaintiff as a license or permission to occupy. But afterwards, in the course of his address, and after a short communication with the plaintiff's attorney, he retracted any admission he might be supposed to have made as to the existence of such an agreement, saying it was in the hands of defendants' counsel and constituted matter of defence, wherefore it was not (though anticipated by the observations he had made) to be taken as admitted for the purpose of the defence, unless regularly proved by defendants. At the close of his address, the defendants' counsel desired to hold the plaintiff to the admission made by his counsel, and contended he could not first admit to found observations upon in anticipation of the defence, and then retract it in order to compel the defendant to give final proof of the instrument and its contents. The case then proceeded, and the plaintiff gave evidence to prove his

possession and right of possession to the several closes or pieces of land mentioned and described in the declaration, which appeared to be that part of lot No. 77, township of Sandwich, lying between the high or main road, on the top of the high bank of the Detroit river and the water's edge, including a pear orchard containing twelve trees and the water lot in front thereof extending to what is termed the channel bank of the river, being a line of submerged bank far out in the stream, where the water suddenly deepens and forms the main channel of the river. There were therefore three continuous closes:—first, the front part of lot No. 77, to the water's edge—Second, the water lot in front thereof; and Third, the land covered with water between the front of such water lot and the channel bank of the river, all situate and being at the lower side of the village of Windsor and in front thereof, opposite the city of Detroit, and nearly opposite the Michigan railroad station on the river Detroit, in front of that city. It was alleged that no government grant had been made by patent of the water lot; but the plaintiff gave evidence of thirty year's possession by himself and those under whom he claimed, which was held sufficient *prima facie* evidence as against defendants to go to the jury, and the verdict being in the plaintiff's favor on the pleas of not guilty and not possessed, which is not moved against or excepted to on this application, so far as respects plaintiff's title and right of possession, it is not necessary to state the evidence in full upon that point. The plaintiff also proved the defendant's entry upon all the closes, the destruction of the pear orchard, the digging away of the bank in the road leading down to the river, the throwing large quantities of logs into the river upon the water lot in order to make land for the defendants' works, to the injury of his wharf. Also that great numbers of piles had been driven into the bottom of the river in deep water, as far out as the channel bank, in front of and above and below plaintiff's closes, to the obstruction of the access by water to the plaintiff's water lot, wharf, &c; the effect of defendants' operations being to injure plaintiff's property, directly and indirectly, very seriously.

It was proved that the defendants took possession of the closes in question in July or August, 1853; but apparently after their engineer, Mr. Scott, had been served with a notice not to enter.

The plaintiff proved service upon him of a notice dated the 25th of August, 1853, signed by plaintiff, addressed to the said engineer and to Ward and Green, contractors, and stating that the plaintiff forbid them and defendants, or any other persons, trespassing upon or otherwise interfering with his land, part of lot No. 77 and part of lot No. 78, 1st concession, township of Sandwich; or with his privileges and rights to the water of the river Detroit in front of his said lands, or in any manner obstructing him in the exercise of his rights to the said lands and waters and to the wharf situate in the said river in front of the said lot No. 77. It was proved that this notice was also communicated to the defendants' solicitors at Sandwich, who told the engineer to go on regardless of the notice. The engineer proved the trespasses complained of to the front part of lot No. 77, the water lot and waters in front thereof—the piles extending out from 20 to 30 feet depth of water.

It was also proved that the present terminus of the defendants' railroad and works is half a mile higher up the river than the *locus in quo*—a part of the village of Windsor and two ferries, wharves, roads, &c., intervening. Also, that after having been carried to the state they are now in, the works in front of plaintiff's and all between the present terminus were discontinued. That at present the plaintiff's closes are not used or necessary for the defendants' works. At the close of the plaintiff's case the defendants counsel objected:

1st. That the evidence shewed no sufficient case—referring to *Somerville v. The Great Western Railway Co.* 11 U. C. Q. B. R. 304, and contending that the original entry being lawful by the admission made by plaintiff's counsel in his opening trespass does not lie—Referring to 4 W. IV. ch. 29, sec. 5, and 16 V. ch. 99, sec. 4.

2nd. That the defendants were entitled to notice of action—16 V. ch. 99, sec. 10.

In reply, it was contended the plaintiff could not be

non-suited, the special pleas being traversed and being for the jury. The learned judge who tried the cause, *Macaulay, C. J.*, said it appeared to him that the first question was as to the plaintiff's possession : that there was no doubt as to the front part of lot No. 77. As to the water lot, that it was for the jury—referring to 10 & 11 V. ch. 5, secs. 1-2.—upon a possession of thirty years of all or any of the land covered with water in front of lot No. 77.

That there was evidence that defendants had trespassed upon lot No. 77 and the water lot in front thereof.

That the fourth plea and fifth pleas were questions for the jury—*Somerville v. The Great Western Railway Co.*, 11 U. C. Q. B. R. 304.

Becher, for defendants, addressed the jury on the whole case, and relied upon the opening of plaintiff's counsel as a sufficient admission of the plaintiff's permission to defendants to enter to support the third and fourth pleas: contending that if the original entry was justified the defendants could not be made trespassers without a new assignment or special replication of excess, *ex post facto*.—The learned Chief Justice refused leave to the plaintiff's counsel to reply, and declined withdrawing what had been said in his opening from the jury ; although, adverting to the notice of of the 25th of August 1853, and considering the vague and unsatisfactory way in which any license or permission to enter was before them, said he did not suppose much stress or reliance would be placed upon a hasty statement of counsel inadvertently made. The learned judge told the jury:

1st. That he thought there was evidence to shew the plaintiff possessed.

2nd. That defendants entered.

3rd. That such entry was at the time when, &c., *bona fide* to appropriate the *locus in quo* to the use and purposes of the railroad.

4th. That the defendants afterwards abandoned it.

5th. That serious damage had been done to the plaintiff.

6th. That whether the defendants did enter as alleged in the fifth and other similar pleas, was matter of fact for the jury. That there was ample evidence thereof that they did so.

7th. And if so, the case cited applied in defendants' favour.

8th. That as to the ground taken for plaintiff that, *ab initio*, the land taken and the work done was unnecessary, vexatious, and without the privileges or protection conferred on the defendants, it was for the jury; except that even if so the case cited seemed to shew that plaintiff's remedy would be under the arbitration clauses, unless indeed by the 16 V. ch. 99, sec. 6, a tender or payment into court formed a necessary condition precedent to such entry: as to which he said he thought the defendants (in the absence of any private agreement) should tender and pay into court as therein prescribed, to justify their entering and taking plaintiff's land against his will. That taking it to be permanently kept for such purpose would be encroaching on the fee simple.

That if the original entry was *bona fide*, &c., the fifth plea should be found for defendants, and that excess or subsequent abandonment should have been replied if defendants thereby became liable in an action of trespass *quare clausum fregit*. That in the present replication the pleas only were traversed and put in issue, and that they related to the time of the entry in the first instance. He left the several pleas to the jury, reading the special pleas over and over again to impress upon them what he took to be the substance of the issue thereunder.

The jury retired, and after a time returned with a verdict for the plaintiff, £337 damages. While entering it on the N. P. Record the defendants' counsel requested the judge to inquire whether they found the special pleas for the plaintiff or defendants; and in answer to the question on that head seemed to say for defendants. The learned judge then gave them a written note of the points to be decided, as follows:—

1st. Was the plaintiff possessed of both the closes; or if only one, of which.

2nd. Did the defendants trespass upon said closes, both or either of them.

3rd. Did the plaintiff graht the defendants leave and license or permission to enter upon the said closes.

4th. Did defendants enter into and upon the said closes in order to make and construct certain roads, ways, and wharves thereon, which were requisite and necessary for the purposes of the said railroad.

5th. Damages.

It should be explained that the learned judge stated to the jury the plaintiff shewed no possession of the land covered with water beyond the limits of the water lot or the channel bank, and could not sustain trespass *quare clausum fregit* in respect thereto, nor could he set up the defendants' works by driving piles down there as doing consequential injury to the plaintiff's closes, the action being trespass for breaking and entering his closes, and not case for consequential damage thereto. The jury retired again, and afterwards entered and answered the questions as follows: The first and second they answered in the plaintiff's favor, as to both closes; the third and fourth they answered in the affirmative as mentioned in defendants' favor; to the fifth they said £337 damages, and the verdict was then recorded; for the plaintiff, on the issues or pleas of not guilty and not possessed, and for the defendants on the issues of leave and license and permission, and upon the special pleas or issues of justification under the statute, and damages for the plaintiff assessed at £337.

In the following term (M. T. 18 Vic.) the plaintiff's counsel obtained a rule on the defendants to shew cause why a new trial should not be had on all the issues, or on the issues found in favor of the defendants, without costs, being, as to the issue on the plea of leave and license and permission, against law and evidence and the judge's charge, and the jury being moreover misdirected as to those issues, and upon affidavits filed, and on the ground that the verdict for defendants on the other issues is contrary to law and evidence, and for misdirection. The affidavits are made by the plaintiff's counsel and attorney, and explain that the agreement spoken of is in the defendants' possession, was noted in the brief merely as to be expected in support of the defence, and was not intended to be admit-

ted, produced or proved by plaintiff; that defendant's counsel was permitted to comment upon it as if in evidence, without putting it as part of his defence, whereby plaintiff was deprived of a reply; that though not produced or proved, it was suffered to go to the jury as sufficiently in evidence for them to notice it, by reason of what the plaintiff's counsel had inadvertently stated in his opening, and the jury were thereby misled to adopt an alleged license not proved, and without any tangible proof or knowledge of the contents of the instrument said to contain it.

Becher and Dr. Connor, Q. C., shewed cause, and referred to *Somerville v. The Great Western Railway Company*, 11 U. C. Q. B. R. 304; and contended that the plaintiff's counsel could not retract an admission gratuitously made in order to found observations upon it adverse to the defendants, and in favor of the plaintiff's right to recover notwithstanding—*Roscoe Ev.* 14; 1 *Taylor Ev.* 520.

That the agreement, as read from his brief, was an agreement to sell &c. at £1000, provided the terminus was stationed there. That defendants were enabled by law to enter upon the *locus in quo*, and therefore not trespassers. Reference was also had to the argument in the ejectment case of *Rankin v. defendants*, ante p. 463.

Cooper and Connor, Jr. for plaintiff, in reply, contended that the notice before entry put an end to any previous license that might be supposed to exist; that the contents of the agreement spoken of were not shown; the date was unknown, and nothing appeared on which a verdict against plaintiff could be safely rested. That the plaintiff did, through his attorney, object at the time to the premature statement of his counsel in reference thereto, and that the casual admission should, under the circumstances, have been entirely withheld from the jury—*Phil. Ev.* 365, 8 edition; 1 *Taylor's Ev.* 520; *Colledge v. Horn*, 3 *Bing.* 119; *Duncombe v. Daniell*, 8 C. & P. 222: that the *onus probandi* was on defendants to prove license and permission, which was not proved or admitted, but denied—2 D. & R. 714; *Wallis v. Harrison*, 4 M. & W. 538. At all events that the notice of 25th August rebutted any such inference

without proof of an irrevocable license, which was not given. On the other issues he referred to the statutes as cited in Rankin's case, and submitted that the case of *Somerville v. The Great Western Railway Co.*, 11 U. C. Q. B. R. 304, was superseded by the statute 16 V. ch. 99; that the defendants having entered *bona fide* would not of itself be a justification in trespass without more; that the plaintiff could not promote an arbitration, and that the defendants could and should have done so in the first instance; and referred to *The Great Western Railway Co. v. Coll & McGregor*, U. C. Chan. Reports. That the abandonment or nonuser repelled *bona fides* in the original entry, and shews it only an experimental pretence: that the license and permission were found for defendants without evidence: that the defendants had no right to go along and upon the river, as they had done; and, having relation to where the line of railroad struck the waters of the Detroit, had no right to take any of the plaintiff's land, situate as it is, far below that point, and the whole front of Windsor intervening: that the river side had been unreasonably encroached upon to an excessive degree, and there was no necessity or legal right to extend the works to and upon plaintiff's property: that the 12 Vic. ch. 10—touching the construction of statutes—is prospective only, and not extending to 4 W. IV. c. 29, which should be construed strictly in favor and protection of private rights—2 Ch. Rep. 658.

The argument and cases cited in Rankin's case were also referred to.

MACAULAY, C. J.—The opinion just expressed in the case of Rankin against the present defendants shews that I do not consider the defendants entitled to enter and permanently appropriate lands owned and possessed by the plaintiff to the purposes of their railroad against his will, and without a reference under the statutes; nor, on the same principle, to enter and possess with such intention, though the design to appropriate be afterwards suspended or abandoned. Consequently, if the defendants entered upon the *locus in quo* in defiance of the plaintiff, without his

consent, and against his will, the action *prima facie* lies—see Johnson v. The Ontario Simcoe and Huron Railroad Company, 11: U. C. Q. B. R. 246. It follows that the fifth, eighth, eleventh, fourteenth and seventeenth pleas are not good defences in law, unless supported by proof of permission to the defendants to enter by consent of the plaintiff, or by virtue of a reference.

No such proof was given, and therefore the verdict as to those issues should be set aside, notwithstanding the finding of the jury that the defendants entered *bona fide* in order to make and construct ways, roads, and wharves thereon, which were requisite and necessary for the purposes of the defendant's railroad.

They had no legal right to do so except under the provisions of the 4 Wm. IV. ch. 29, s. 11—the object being permanently to interfere with and encroach upon the fee simple, and the plaintiff's right and easement—that is, to interfere with and encroach upon his estate or interest in the premises as distinguished from the mere temporary occupancy of the surface of the soil. That those lands were deemed necessary and proper to be taken for the railroad at the time when the jury have affirmed that they were not absolutely necessary, the event has shewn. The terminus has been established at another point higher up the river Detroit, and the railroad is finished and in operation, affording the best proof that the *locus in quo* was not necessary. Whether it was proper may, in my opinion, well be questioned, considering that the *locus in quo* is opposite the lower part of the front of the village of Windsor on the river Detroit, and that the railroad strikes such river some distance above the village, and terminates opposite the upper part of the front thereof, and that to have continued it to the plaintiff's close it must have crossed the whole front of the town without any apparent necessity, expediency or convenience, but to the serious obstruction and inconvenience of the inhabitants. I think there should be a new trial, as to these pleas. But as the defendants might be willing to waive these pleas, and consent to a verdict thereon in the plaintiff's favor, though perhaps not advisable at the risk of their operating by

estoppel hereafter, it is proper to consider the other issues of permission and leave and license. As to these I also think there should be a new trial. The plaintiff has sustained serious damage by the acts of the defendants and their officers and servants, and should be entitled to some remedy. Whether he can ultimately sustain this action, I consider doubtful ; but at present I do not think it would be right to hold him concluded on the pleas of leave and license by reason of the inadvertent statements of his counsel in opening the case, and which the plaintiff, through his attorney and counsel, promptly desired to explain away and retract. Neither party produced formally in evidence the written instrument or agreement referred to by the plaintiff's counsel in his opening. As it was represented to the jury, I understood that while it contained an agreement on the plaintiff's part to sell and convey the *locus in quo* to the defendants at a price agreed upon, with leave to the defendants to enter &c. express or implied, it was only so agreed and consented conditionally, namely, on condition that the defendants should establish their depôt or terminus at that point, and not where it is, and that the defendants' relinquishment of that intention afterwards has given rise to this action. I took it that this agreement preceded the entry complained of ; or at all events that the defendants went on trespassing (as the plaintiff contends) after express notice in writing prohibiting their doing so.

Now whether the defendant's original entry into possession preceded the notice proved to have been served or succeeded it, I cannot tell, without knowing the date of the instrument ; in its absence, that fact was not and could not be legally proved. Moreover, whether if produced, it would shew a license irrevocable, and if it did not whether trespass *quare clausum fregit* would lie after the notice mentioned, without a previous entry by the plaintiff, or without a special replication, are questions that did not arise or present themselves in the course the case took at *Nisi Prius*. Under these circumstances, the proof of leave and license at the time when &c. is so unsatisfactory that not only should

I have been better satisfied with a verdict the other way, but I do not think it would be right to refuse relief on this application.

My reason for questioning this action arises from the allegation made at the trial, that the evidence did not prove a total abandonment by the defendants, and that if not, the original entry was lawful; and the defendants entitled to hold the land, or even if they have abandoned it, that the plaintiff's remedy was for compensation under the statutes—*Rex v. Hungerford Market Co.* (4 B. & Adol. 327). The time limited for completing the railroad is not yet expired (See 8 Vic. ch. 86 s. 6); and until the time expires, a right to resume, continue, or extend the work may exist. See the cases cited in *Rankin v. The Great Western Railway Co.* (ante page 463).

McLEAN, J., and RICHARDS, J., concurred.

Rule absolute, costs to abide the event.

ALTEMAN v. SMITH.

General Issue—Not Guilty.

The plea of not guilty in case for seduction does not deny or put in issue the allegation that the person seduced was the servant of the plaintiff.

Declaration states that defendant, wrongfully intending to deprive plaintiff of the service and assistance of Elizabeth Alteman, the sister and servant of plaintiff, on &c. debauched and carnally knew the said Elizabeth, then and from thence hitherto being the servant and sister of the plaintiff, whereby she became pregnant and sick with child, and was afterwards delivered of such child; by means thereof she was disabled &c. and plaintiff damnified.

Pleas—Defendant not guilty of the said supposed grievances &c. *modo et forma* &c., and issue.

At the trial the seduction, pregnancy and birth of the child were proved, but at the time of the seduction the plaintiff's sister was not living with the plaintiff, but as a hired servant with another person, though she afterwards was confined and nursed at plaintiff's. The jury found for plaintiff £150, with leave to defendant to move a nonsuit

on the ground that the relation of master and servant was not proved.

Read obtained a rule accordingly.

Irving shewed cause, and contended the fact of service was not put in issue by the plea of not guilty, but the wrongful act alleged only, and that if intended to be denied the defendant should have pleaded that the sister was not plaintiff's servant, referring to *Torrence v. Gibbins*, 5 Q. B. 297; *Davies v. Williams*, 10 Q. B. 725, S. C. 13 L. J. S. Q. B. 36; S. C., N. 7 Jur. 1153; S. C. 1 D. & Mer. 226; 9 Law Times 220; *Barrett v. Oliver*, 7 Law Times, 469, Q. B., 2nd August, 1846.

Read, in reply, contended that the relation of master and servant was put in issue by the general issue, and its non-existence proved by the plaintiff's own evidence.—*Eager v. Grimwood*, 1 Exch. Rep. 61; 16 Eng. Rep. 448.

MACAULAY, C. J.—I cannot satisfy myself that the plea of not guilty does put in issue the relation of master and servant at the time of the seduction. It was decided in the case of *Grinnell v. Wells* (7 M. & G. 1033), in conformity with prior decisions, that loss of service was the gist of the action. *Tindal*, C. J., said it depended not on the seduction itself, which was the wrongful act of the defendant; that it was the invasion of the legal right of the master to the services of his servant that gave the master or father the right of action for the seduction of his servant or daughter and servant. He refers to *Dean v. Peel* (5 East 45) as quite in point; and, taken together, they shew that where loss of service is spoken of as being the gist of the action it means that the relation of master and servant must exist at the time of the seduction or wrongful act alleged *per quod servitium amisit*, including both the wrongful act and the consequential damage; and the issue of it is, the relation of master and servant at the time of the seduction, followed by sickness, &c. that causes loss of service. The declaration in that case shewed amply loss of service, if it had shewn the relation of master and servant at the time of the seduction, and the real objection to it was, that it failed to shew the relation.

The difficulty has arisen in consequence of *Torrence v. Gibbins* (5 Q. B. 298), in which, in an action on the case, a plea denying that the female seduced was the plaintiff's servant *modo et forma* was held good; and it seems to treat it as mere inducement, or not put it in issue by the plea of not guilty. Again, in *Davies v. Williams* (10 Q. B. 725), which was trespass for the seduction of plaintiff's daughter and servant, the plea of not guilty, and that she was not at the times when &c. the servant of plaintiff *modo et forma*, were pleaded together. But though she was confined at plaintiff's house &c., the action failed because she was out at other service when seduced.

Patteson, J., said the loss of service consequent upon the defendant's wrongful act was the gist of the action, and that to support such an action the defendant's act must have been wrongful to the plaintiff, and he asked how was a seduction wrongful to the plaintiff unless the relation of master and servant subsisted at the time; and the whole of his language, and that of *Coleridge, J.* is of like import. Then in *Holloway v. Abell* (7 C. & P. 528), *Littledale, J.*, held the relation of master and servant put in issue by the plea of not guilty since the new rules.

Eager v. Grimwood (1 Ex. R. 61)—Loss of service was held essential to be proved, and that mere seduction, unless the defendant was father of the child, was insufficient. In that case the relation of master and servant existed.

The plaintiff's counsel argued that not being traversed, the damage, if special, was admitted, citing *Torrence v. Gibbins* (5 Q. B. 297), in which *Alderson, B.*, said upon the plea of not guilty, if it appeared that the party seduced was in the service of a third person, according to that argument the plaintiff would be entitled to a verdict.

Wilby v. Elsten (8 C. B. 142)—It was held that in case for words not actionable *per se* averring special damage, not guilty puts in issue not only the speaking of the words but also the special damage alleged.

Powell v. Bradbury (7 C. B. 201)—Assumpsit on a contract of hiring, alleging the wrongful dismissal of plaintiff; a plea alleging that defendant did not wrongfully

and without reasonable or probable cause dismiss plaintiff, put in issue the fact of dismissal only and that the residue was immaterial, on the ground, I suppose, that if defendant did dismiss plaintiff, the matter which justified it was to be pleaded in defence affirmatively, and that such special matter was not to be set up under a traverse of the alleged wrongfulness, which was an inference of law *prima facie* from the fact of dismissal.

Mitchell et ux. v. Crassweller (22 L. J. C. P. 100)—Declaration stated that defendants, on the 8th Sept. were possessed of a cart and horse, which was being driven by defendants' servant, and whilst plaintiff's wife was crossing a street in London called G. street, the defendants by their servant so negligently drove &c. that she was injured &c. *Plea*, not guilty. Held, that the inducement that defendant was possessed of a cart and horse which was being driven by their servant—not saying at the time of the grievance—was immaterial and not traversible, and that defendants might shew that the driver was not at the time when &c. acting as their servant, though it was their horse and cart and a servant of theirs was driving it. The form of averments in that declaration resembles a good deal the present, which, in the first place, says defendant, intending to deprive plaintiff of the services of Elizabeth Altaman, his servant, on &c. debauched the said Elizabeth Altaman, then being the servant of the plaintiff. The latter is a material averment; and not guilty of the wrongful act alleged certainly traverses the seduction of Elizabeth Altaman, whose seduction would not be wrongful toward the plaintiff unless she was his servant at the time. I was for a long time disposed to think the general issue included a denial of that fact as well as the fact of the seduction, but looking back at *Torrence v. Gibbins*, and then forward to *Renshaw v. Bean* (10 Eng. Rep. 417), in which case, though not one of seduction, Lord Campbell said the case of *Frankum v. Lord Falmouth* (2 A. & E. 452) established this, that the plea of not guilty under the new rules put in issue only the fact alleged to have been wrongfully done, and not the wrongfulness of that fact, and though the contention there was that the plea

did deny the wrongfulness of the fact complained of and so incidentally denied the right asserted by the plaintiff, which is not the precise contention made in the present case, yet we are of opinion that the new rules and that case in effect shew that the plea of not guilty denies only the fact complained of, and not its nature &c.; and I am therefore obliged to relinquish my first impressions. In the case before us the act alleged was wrongful in itself—that is the seduction of the plaintiff's sister—without anything more to shew it wrongful. That wrongful fact is denied, but that such denial puts in issue its wrongfulness toward the plaintiff—in other words, involves a denial that if the fact be established, still she was not the plaintiff's servant—seems inconsistent with the weight of authority.

The wrongful act alleged is the seduction of Elizabeth Alteman, how wrongful to the plaintiff is shewn by the additional or separate fact that the person seduced was, at the time when &c., his servant. That she was plaintiff's servant at the time when &c., is not traversed; and if she was, it is not contended the wrongful fact or act, and the injurious consequences, or consequential damage were not proved.

In case for crim. con. the plea of not guilty would not deny the marriage, that is, the relation of husband and wife. But of such a case it might be said, the fact of crim. con. being proved, the action would be established without proof of special or consequential damage, as required in actions of seduction. That may be quite true, but it does not meet the difficulty. In seduction, not guilty does put in issue the fact of seduction, as it is the loss of service as consequential damage to the master; still marriage, or the relation of husband and wife in the one case, and servitude or the relation of master and servant in the other, are facts preceding and existing at the time of the wrongful act committed, and the damage or consequential injury, when proved, refers back to the relation existing between the husband and wife, or master and servant at the time of the wrongful act; and the plea of not guilty may therefore well include a denial of the fact, and its alleged consequences when such consequences are material to the maintenance

of the action, without involving a denial of the alleged pre-existing relationship which shews how such wrongful fact and its consequences operated wrongfully towards the plaintiff's husband or master.

It is a nice question, upon which a different opinion might well be adopted. My own impressions at first tended strongly to the conclusion contended for by the defendant's counsel; but the construction placed upon the general issue in actions on the case under the new rules, (including trover, in which the wrongfulness of the act is now held to be put in issue, but only because it is considered as contained in the technical meaning of the word conversion), and the decisions and practice in relation to the action of seduction, do not seem to warrant me in holding that the allegation that the party seduced was the plaintiff's servant is not material matter of inducement, and as such requiring to be specially traversed, or that it is denied and put in issue by the plea of not guilty.

McLEAN, J.—By our rule of court it is established, that in actions on the case the plea of "not guilty" shall operate as a denial only of the breach of duty, or *wrongful act alleged to have been committed by the defendant*, and *not of the facts stated in the inducement*, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

In the case of *McLeod v. McLeod* (9 U. C. Q. B. R. 331), which was an action brought by the father for the seduction of his daughter under our statute, the court of Queen's Bench held that a plea denying that the daughter was the servant of plaintiff was bad, as putting in issue an inference of law; but in that case the action was maintainable whether the daughter was living at home or abroad, and under the statute the plaintiff could not be called upon to prove any service. In this case the plaintiff was bound to prove a loss of service, and without such proof he could not have recovered, had a plea been filed that the sister was not

plaintiff's servant at the time, when &c.; and unless the plea of not guilty puts in issue the service, plaintiff, though in the position of a stranger, and having no right whatever to sue except for the loss of service, will be entitled to recover and to hold a verdict which has been rendered in his favor for a large amount, considering the circumstances and the standing of the parties. In the case of *Grinnell v. Wells* (7 M. & G. 1033), where an action was brought by the father for the seduction of his daughter, a minor, without any allegation of service, the court held that the action could not be maintained and arrested the judgment; and in the case of *Davis v. Williams* (10 Q. B. 725), which was an action for the seduction of plaintiff's daughter, *per quod servitium amisit*, it appeared that the daughter had been seduced while out at service, that she left her service in a state of pregnancy and returned home, where she was supported by plaintiff till after her confinement. It was held that as implied relation of mistress and servant did not subsist between plaintiff and the daughter at the time of the seduction, the action was not maintainable. In that case there was a plea of not guilty, and also a plea that the daughter was not at the said times when &c., or any of them, the servant of plaintiff *modo et forma*.

In the case of *Torrence v. Gibbins* (5 Q. B. 297, 1843), to a declaration complaining that defendant debauched J., the daughter and servant of plaintiff, and alleging damage by loss of service, defendant pleaded that J. was not the servant of plaintiff. It was held a good plea on special demurrer, alleging for cause that the plea amounted to not guilty.

In *Frankum v. The Earl of Falmouth and others* (2 A. & E. 452, S. C. 4 N. & M. 330, 1835) it was held that under the new rules not guilty, pleaded to a declaration in case for the wrongful diversion of water from plaintiff's mill, put in issue the *mere fact* of the diversion, and not *its wrongful character*. In this case the wrongful act complained of is the seduction by the defendant of Elizabeth Alteman, *alleged to be plaintiff's sister and servant*; and the damage, if any, must arise to the plaintiff as master, in

being deprived by the defendant's act of the services of his servant. The plea of not guilty puts in issue the *wrongful act* alleged, but it does not call in question the right of plaintiff to the services of his sister as her master; and, as the recital or inducement at the commencement of the declaration alleges that plaintiff wrongfully and unjustly intended to injure the plaintiff and to deprive him of the service of Elizabeth Alteman, his sister and servant, and that having such intention he committed the act complained of, and that allegation is not denied by the defendant, and there is no denial that the sister was the servant of the plaintiff, it appears to me that the plaintiff is entitled to hold the verdict. If it were competent to the court to interfere, and to grant a new trial, I confess it would be my strong intention to do so, inasmuch as under the circumstances the verdict is unusually large, and it is recovered by a brother, who has not probably the same inclination which a father may be supposed to entertain, to apply the amount to the benefit of the injured party; but if the action is maintainable at law, we cannot, on the ground of excessive damages, interfere for the relief of the defendant.

RICHARDS, J., concurred.

Rule discharged.

THE NELSON AND NASSAGAWEYA ROAD COMPANY V. PHILO
D. BATES.

By the statute 12 Vic., ch. 84, the plaintiffs' company was to consist of not less than five persons, who must each subscribe for a sufficient quantity of stock, execute an instrument, pay to the treasurer six per cent. on the capital stock subscribed, and register such instrument together with a receipt from the treasurer for such instalment of six per cent. with the registrar of the county, before making calls.

The directors having given to the treasurer a promissory note for a sum amounting to six per cent. on the capital stock, who gave a receipt as for so much money, forty per cent. on the stock subscribed was then called in, and a memorial of the instrument of incorporation afterwards registered.

In an action of debt for calls by the company, defendant pleaded that at the time the cause of action accrued there was no such corporation as in declaration mentioned.

Held. That the 55th section of the 16th Vic., ch. 190, which was passed to aid irregularities in the formation &c., of such company, put an end to objections to the irregular way in which the first six per cent. was paid or the instrument registered, and that plaintiffs were entitled to recover.

Writ issued 7th March, 1854; declaration 22nd March, 1854. Debt for calls, £45.

Declaration states defendant to be the holder of 50 shares in the said company, and indebted to the plaintiffs in £25 for five calls of five pounds upon each of the said shares, whereby an action hath accrued by virtue of the 16 Vic. ch. 190.

Second count states that defendant, on the 10th January 1854, was indebted to plaintiffs in £20 for interest.

Pleas—First, Never indebted in manner and form, &c.

Second, That at the time the cause of action accrued there was not, nor is, any such corporation as in the declaration mentioned: to the country, similiter and issues.

At the trial, before *Draper, J.*, it was admitted that the instrument produced was the original instrument of incorporation, that a memorial thereof had been registered on the 26th August, 1850, as appeared by certificate endorsed, that the subscribers whose names were endorsed took stock to the amount of £3000, (six hundred shares of five pounds each); that the calls, if duly made, were sufficiently and duly advertized.

The secretary and treasurer of plaintiffs, at their formation in 1850, and when the first call was made, produced the minute book of the directors and proved a resolution passed the 27th May, 1850: "That forty per cent. of the capital stock of this company be called for, and payable as follows—namely, ten per cent. per share on the first of September, 1850, ten per cent. per share on the first of October, 1850, ten per cent. per share on the first of November, 1850, ten per cent. per share on the first of December, 1850; there being only a meeting of directors, but the five directors being present, and the proceedings signed by the president, and the meeting being held at an inn in the township of Nassagaweya.

That at such meeting the five directors signed a promissory note to such secretary and treasurer for £180 as six per cent. on the capital stock subscribed of three thousand pounds, and who gave a receipt as for so much money.

At a meeting of directors in the township of Nelson on

the 15th of January, 1854, five directors being present, it was resolved, that notice be given to those shareholders who had not paid up the first four instalments of ten per cent. on their stock that unless payment be made thereof steps would be taken after the first of March then next to enforce it, and that the fifth, sixth, seventh, eighth, ninth, and tenth instalments be called in as follows: the fifth on the first of March, 1854, the sixth on the first of April, the seventh on the first of May, the eighth on the first of June, the ninth on the first of July, and the tenth on the first of August, 1854; signed by the president.

It further appeared that the note was given with a view to the organization of the company under the impression that it was legal; also that various sums, amounting to £180, having been received by the treasurer from various stockholders about the 20th of November, 1850, not before the, promissory note was given up or destroyed; that part of the road, about six miles, (twenty-four being the whole length) has been finished, and the rest of the line partly made; that there had been an election of directors in 1851, and the memorial of the instrument was registered at the suggestion of the registrar. Defendant refused to pay the calls made in 1850.

The jury found that, when the first four calls were made, six per cent. of the capital stock of £3000 had not been paid except by the promissory note of the directors, nor at the date of the registry of the instrument of incorporation; that such note was never paid except out of monies paid by stockholders upon the calls made on the 27th of May, 1850; that the earliest date at which the treasurer had in his hands a sum equal to six per cent. on the £3000 subscribed was the 20th November, 1850; and that the note was given to elude the provisions of the statute and in fraud of the subscribers to the instrument of incorporation.

A verdict was then rendered for the plaintiffs by consent for £39, being £35 for calls and £4 for interest claimed by plaintiffs, subject to the opinion of the court upon any points that might be raised upon the evidence in exception to the judge's charge, &c.

In Michaelmas term last, *Proudfoot*, for defendant, obtained a rule on plaintiffs to shew cause why such verdict should not be set aside, and a verdict be entered for defendant, on the grounds that the action of debt is not maintainable on the evidence, &c., as more fully stated at the argument.

Dr. Connor, Q. C., shewed cause during the same term. The points made were : that by 12 Vic., ch. 84, sec. 4, there must be not less than five persons who must each subscribe for a sufficient quantity of stock, execute an instrument, and pay to the treasurer six per cent. on the proposed capital stock, and should have registered such instrument, together with a receipt from the treasurer for such instalment of six per cent, with the registrar of the county ; and for defendant it was contended :

First, That the facts shewed the plaintiffs not a legally constituted corporation, referring to the statute 12 Vic. ch. 84, sec. 4, and 16 Vic. ch. 190.

Secondly, Wherefore the calls were not legal or valid; that the instrument of incorporation was not signed or registered pursuant to the statute 12 Vic. ch. 84—*Niagara Falls Company v. Bevan & Hamilton*, 8 U. C. Q. B. R., 307.

That the defects are not mere informalities, and not cured by the last act.

That the first call preceded registration, and at a time when the directors were not empowered to make calls; and being invalid at the time, was not rendered sufficient by the 16 Vic. ch. 190. *The Norwich Navigation Company v. Theobald, M. & M.* 151; *The Thames Tunnel Company v. Sheldon*, 6 B. & C., 341; *The Stratford Railway Company v. Stratton*, 2 B. & Ad. 418; *The Waterford &c. Railway Company v. Dalbiac*, 6 R. W. C. 753.

Thirdly, That *debt* will not lie for instalments only before the whole call becomes due.—*The London & North Western Railway Company v. McMichael*, 20 L. J. N. S., 233; *London & North Western Railway Company v. McMichael*, 6 Railway Cases 495.

MACAULAY, C. J.—The statute 12 Vic., ch. 84, sec. 18, authorized the directors to call in all sums subscribed at such times and in such payments or instalments as they should deem proper, giving notice, &c. Section 30 of that act, and 16 Vic. ch. 190, sec. 18, enacted that on the trial or hearing of any such action it should be sufficient for the company to prove that the defendant at the time of making such call was a holder of one or more shares, of which, in the absence of any transfer, proof of the subscription of the original agreement to take stock should be sufficient evidence; and that such call was in fact made, and such notice thereof given as is required; and that it should not be necessary for the company to prove the appointment of the directors who made such call or any other matter whatsoever. And therefore the company should be entitled to recover what should be due upon such case with interest thereon, unless it should appear that due notice of such call was not given.

The 12 Vic. ch. 84, sec. 29, and 16 Vic. ch. 190, sec. 17, provide for a short form of declaration, stating that defendant is a holder of one or more shares, &c., that he is indebted to the company in the sum to which the calls in arrear shall amount in respect of one call or more upon one share or more, stating the number and amount of such calls, whereby, &c., an action hath accrued by virtue of the act.—See also 12 Vic. ch. 84, secs. 1, 4, 6, 9 and 10, and 16 Vic. ch. 190, secs. 1 and 16. Section 55 of the last act enacts, that notwithstanding *any irregularity* which may have occurred in the formation, registration, or management of any such company, or that all the requirements of the statutes have not been strictly complied with, all such companies which shall *bona fide* have proceeded in the construction, &c., of any road, &c., before the passing of that act shall be held duly organized, formed, registered, constituted and managed under the said acts, anything therein to the contrary notwithstanding, saving the rights of any party in any proceeding, action or suit then pending, that is, on the 14th June, 1853. The last section seems to put an end to all objections to irregularities in the formation,

registration or management of the company, the irregular way in which the original six per cent. was paid or the instrument registered: the prior sections shew that it is not necessary for the plaintiffs to prove the appointment of directors; and sections 18 and 30 of the respective acts shew not only what it shall be incumbent on the plaintiffs to prove, but also what may be shown negatively. The plea of never indebted imposed on plaintiffs the burthen of proving all the act requires them to prove—that seems to have been done; and admitting the calls duly notified, I do not think the defendant, under a plea denying the existence of any such corporation, can shew that there is no such corporation *de facto*, but that it was not regularly formed in the observance of the details required by the statute 12 Vic. ch. 84, sec. 4.

It appears to me a mistaken idea that such a plea throws upon the plaintiff the onus of proving the due observance of all particulars required in their organization, management, or the making of calls, or that it entitles the defendant to shew defects, omissions or irregularities therein. I think the 55th section of the last act is intended to heal all faults merely of detail, provided the company has *bona fide* proceeded as therein required, and as was proved in this case; also, that the sections 30 and 18, 29 and 17, respectively (above mentioned) entitled the plaintiffs to recover upon proof of the facts stated in the short form of declaration, and that being proved, the plea of never indebted is *prima facie* repelled, and that it cannot be sustained by irregular proceedings in particulars not required to be stated in the declaration, or proved under it.—*London and Brighton Railway Company v. Wilson* (6 Bing, N. S. 135), *The Edinburgh, &c., Railway Company v. Hibblewhite* (6 M. & W. 707), *The Dundalk Railway Company v. Tapster* (1 Q. B. 667, 8), *The London and Brighton Railway Company v. Farelough* (2 M. & G. 674). The case of *The Niagara Falls Company v. Bevan* (8 U. C. Q. B. R. 307), was before the passing of the 16 Vic. ch. 190; and sec. 30 of the 12 Vic., ch. 84, does not seem to have been noticed.

Then it is contended the instalments called for in 1850 are not made valid if all other difficulties are obviated, and

reference was made to the Stratford Railway Company v. Stratton (2 B. & Ad. 518); but the argument used there, that the legislature could not be presumed to have been apprised of their regular calls that had been made, does not apply here, for the 35th section has expressly for its object the rendering valid prior irregular proceedings which the legislature knew to exist; the objection is not to the call itself but to the constitution of the company, and its capacity to make the calls when made; the objections to the formation of the company are cured, and, being cured, the call stands good.

In the case above mentioned the objection was to the company itself, because a sufficient amount of stock had not been subscribed under the first act was considered cured by the second; the objection was to the calls themselves as not duly made, assuming the company to have been legally organized and entitled to make calls at the time such calls were made, and the irregularity in the calls themselves was held not cured by the healing act which was passed with a different intention. It is in favor of the healing act in the case before us being retrospective and confirming the plaintiff's company *ab initio*.

Then it is said the calls by instalments were invalid and that debt would not lie for the instalments called for in 1854, because all them made were not due at the time the action was brought; the case of the Ambergate Railway Company v. Norcliffe (6 Ex. R. 627-9) is quite in point that debt does lie for calls payable by instalments; see ante 2 B. & Ad. 618; The Ambergate, &c., Railway Company v. Coulthard (5 Ex. R. 459), North Western Railway Company v. McMichael (6 Ex. R. 273, 277); that the calls are good but debt will not lie till all are due.

The above cases show clearly that a call may be made payable by instalments, and it appears to me that by the 16 Vic., ch. 190, sec. 17 and 19, payments or instalments, not exceeding ten per cent. at one time, may be called in and demanded as therein provided, and that upon default of payment of any such instalment debt will lie; the action accrues under the statute, and it was not intended to delay

the remedy as contended for. The word *instalment* as used in the call of the 15th January, 1854, means a call of ten per cent. to which the plaintiffs were limited at one time by the 16 Vic., ch. 190, sec. 16; it says it shall be lawful for the directors to call in and demand from the stockholders, &c., all such sums of money by them subscribed, at such times and in such payments or instalments, not exceeding ten per cent. at any one time, as the directors shall deem proper upon notice, &c. This shews that a *call* and *demand* are of equivalent import, and that payments or instalments are used in the same sense, and mean, taken together, that the directors may demand the monies subscribed by calling for payments in their discretion, not exceeding ten per cent. at one time, in other words, in one call.

The resolution of January, 1854, seems to me therefore, in the first place to recall for the payments or instalments demanded in 1850, and in the next place to call in or demand the residue in successive payments or calls of ten per cent. at the periods therein specified and appointed.

I think the payments or instalments therein mentioned are distinct calls though required by one and the same resolution, not one call payable by several instalments.

On the whole it appears to me the plaintiffs are entitled to recover for all the calls, that is those made in 1850, and in 1854, so far as due and payable at the time this action was brought.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

CUNNINGHAM V. FURNISS.

Corporation contractor—Liability of.

A contractor with a corporation to supply hydrants at certain points, with water for public use in the event of fires, is not liable for damages occasioned to the property of an individual rate-payer of the city, by fire, owing to there not being a sufficient supply of water; there being no sufficient privity between such rate-payer and the contractor with the corporation.

CASE. Declaration recites an agreement between defendant and the city of Toronto to supply certain fire plugs

with water, ready to be used in case of need, from defendant's water works; and that there should be at all times, for twenty-one years (not expired), a full and sufficient supply of water for the use of all the said fire plugs, and for the purpose of extinguishing fires: that two of such fire plugs were set up and placed in Yonge street, in the said city, &c.

That the said agreement was made by the city, for and in behalf of and for the benefit of the inhabitants thereof, rate payers, &c.: that plaintiff was seized in fee of lands and houses near the said fire plugs, and paid rates and taxes, &c.: that the plaintiff's houses were consumed by fire: that at such time it was the defendant's duty to plaintiff, &c., to have supplied the said mains or pipes and fire plugs on Yonge street, with a sufficient quantity of water to extinguish such fire, but did not, whereby, &c. Pleas—First, not guilty. Second, agreement, not defendant's deed. Third, not lost or destroyed. Fourth, that there was a full supply of water, &c. Fifth, said agreement not made on behalf of or for the benefit of the inhabitants, rate payers, &c. Sixth, that the fire could not have been extinguished.

At the trial, plaintiff proved defendant's contract with the city of Toronto, dated 15th November, 1842, and that one of twenty-five plugs therein provided for is situated at the corner of Yonge and Queen streets; also the loss by fire of the plaintiff's premises.

Further evidence touching the merits of the plaintiff's case was objected to and overruled, on the ground that the action was not tenable; and the plaintiff was non-suited, with leave to move, &c.

During this term, *Eccles*, for plaintiff, moved accordingly.

Hagarty, Q. C., shewed cause, and cited *Wake v. Tucker*, 16 East. 36; *Tucker v. Tucker*, 4 B. & Ad. 745; *Lord Southampton v. Brown*, 6 B. & C. 718; *Bushnell v. Beaven*, 1 Bing. N. S. 120.

Eccles, in reply, cited *Burnett v. Lynch*, 5 B. & C. 589; *Langridge v. Levy*, 2 M. & W. 519; *Winterbottom v. Wright*, 10 M. & W. 109.

MACAULAY, C. J.—I have not been able to find any case that has created serious doubt in my mind respecting the maintenance of this action. There appears to me no sufficient privity. If the municipality owed it as a duty to each inhabitant, including the plaintiff individually, to provide water to extinguish fires that might occur to his premises, the remedy would seem to be against them, and their contract with defendant would only be one means adopted on their part towards the performance of such duty.

But it is not contended the plaintiff has a direct remedy against the corporation of the city of Toronto, and, if not, I do not perceive how one can accrue against the defendant for not keeping a contract which it was not his incumbent duty to enter into, but which he did enter into with the corporation, to supply hydrants at certain points for public use in the event of fires within the city. So to hold would in effect extend the defendants contract with the corporation to each member of it personally; and on this principle the liability of persons contracting directly with corporations might under various contracts be indirectly extended to each individual member of such corporations, through the medium of actions on the case for breaches of contract with such corporations, as being likewise breaches of duty towards each member of the corporate body; and I find no authority that seems to go this length.

The distinction between cases where a public duty arises concurrently with the contract, and those purely resting in contract, as respects the rights of strangers damnified by breach of such public duty, as distinguished from mere breach of contract, is shewn by the case of the Mayor of Lyme Regis v. Henley (3 B. & Ad. 77), S. C. (1 Bing. N.S. 222), Henley v. Mayor of Lyme (5 Bing. 91).

As a public duty the defendant would be liable to indictment for a breach of it, and his liability in a civil action may be tested by asking whether he would be liable to a criminal proceeding; tried by this test I apprehend the action would fail, on the ground that the subject matter and nature of the contract did not, as incident thereto, create a public duty of the kind required to render him

indictable for the breach of it, and therefore not liable in a civil action to individual inhabitants members of the city corporation.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

WILLIAM E. PARNELL V. THE GREAT WESTERN RAILWAY COMPANY.

The Great Western Railway Company are bound under the statute 4 Wm. IV. c. 29, to fence along the line of the route of their rail road where it crosses public highways either by gates or fences across the high way or across their road, and are liable for accidents occasioned by the want of such gates or fences. McLEAN, J., *dissentiente*.

CASE--Declaration states that defendants owned a railway which crossed a highway in Grantham; that plaintiff was possessed of horses, which at the time when, &c., were lawfully in and upon the said highway; that it became and was defendants' duty to make and erect cattle guards, fences, or gates at or across each end of the said highway at the point where the same was crossed by the said railway, suitable to and sufficient to prevent cattle or horses passing along the said highway, from entering upon the said railway. Yet defendants disregarding such duty, did not make, erect, build, or maintain cattle guards, fences, or gates across each end of the said highway at the point where the same crossed the said railway, by reason of the premises, the said horses of plaintiff then lawfully being upon the said highway as aforesaid, near the said railway at the point aforesaid, went, strayed and escaped from the said highway into and upon the said railway, and were then and there by defendants' locomotive engine, run over and killed.

Second count—Similar.

Pleas—First, not guilty.

Second to first count—Inducement stating by-law of the municipality of Grantham, prohibiting horses running at large upon the highway, and that plaintiff's horses at the time when, &c., were running at large in the said highway, contrary to the said by-law; without this, that the said horses of plaintiff were, at the said time when, &c., law-

fully in and upon the said highway, &c., *modo et firma* in said declaration alleged.

Third to first count—That the said horses were not at the time when, &c., lawfully in and upon the said highway, as in the first count alleged, &c., to the country, &c. Pleas similar to the second and third to the first count, were also pleaded to the second count, and issue taken upon the whole.

At the trial, it was mutually admitted that a young horse of the plaintiff's, value £25, was killed by a train of the defendants' on the night of Friday, the sixth day of July, 1854, at about eleven o'clock; that the said horse had been that morning, with seven other horses, in a field of the plaintiffs abutting on the high road leading from St. Catharines to Niagara; that opposite the said field, there is another highway leading from the latter one and traversing the defendants' railway at the distance of about two miles from said field, more or less; that the fences of said field were sufficient in law the morning mentioned; that said horse escaped from said field, but neither the time nor manner could be ascertained, notwithstanding every enquiry; that a part of plaintiffs farm abuts on the railroad; that the said horse strayed on the highway, and from it got on to the railway; that there was no fence where the said highway and railway intersected, either across the highway or the railway, so as to prevent or hinder cattle straying on the highway, from getting on the railway; that the train was proceeding at about the rate of eighteen miles an hour, and the horse was not seen until it was too late to prevent its being struck; that there was no actual negligence or improper conduct on defendants' part in conducting the train; that the township by-law put in and referred to in the pleadings, was in force in the township at the time, and plaintiff knew it.

A verdict was then taken for the plaintiff for twenty-five pounds (to carry costs), subject to the opinion of the court on the pleadings and the state of facts admitted.

In Michaelmas term last, Dr. Connor, Q. C., obtained a rule on the plaintiff to set aside the verdict, &c.

Vankoughnet, Q. C., shewed cause during the same term.

MACAULAY, C. J.—It appears to me the plaintiff should recover. The statute 4 Wm. IV. ch. 29, sec. 9, authorizes the defendants to construct their railroad to cross any highway lying on the route of the said railroad, between the town of London and Lake Ontario, provided the corporation shall erect and maintain during the continuance of this corporation, sufficient fences upon the line of the route of their railroad or way. See also sec. 5. The 7 Wm. IV. ch. 61, changed the name of the Company to the Great Western Railroad Company, with power to extend it from London to Lake Huron. The 8 Vic., ch. 86, revived the 4 Wm. IV. ch. 29, as if the provisions thereof were repeated and re-enacted subject to the provisions thereafter made, continuing the name given by the 7 Wm. IV. ch. 61, with power to extend their railroad to any point on the Niagara river.—See also the 14 & 15 Vic., ch. 51, sec. 13.

Now I cannot doubt but that the obligations contained in the ninth section of the original act, as well as the privileges therein conferred, extended equally and alike to the extension of the road afterwards authorized both west and east of London; whether the words “upon the line of the route of the railroad,” mean both sides of the line, separating it from the adjacent private closes and from the highways at each crossing thereof, it is not material now to decide, the question may arise under different circumstances according as the line of the railroad may cross a highway above or below its level or upon its own level. In the latter event, which I take to be the present case, I think that the act imposes upon defendants the burthen of erecting and maintaining sufficient fences upon the line of the route of the railroad where it crosses the highway. It is said the defendants could not obstruct the highway by fences or gates on each side, in addition to the railroad, without committing a public nuisance. If authorized and required to do so, it would not be a nuisance if proper

facilities for travellers to pass were afforded ; but if otherwise, it would seem to follow that then the defendants should fence off with swing gates or otherwise, that part of the line of the railroad which crosses highways from the other parts, on both sides of the highway, so that the passage of the highway might remain open and free to travellers, unless when trains were passing, and the defendants' gates or fences open for that purpose ; such fence would be upon the line of the route, though not in a continuous line, but at right angles to lines of fences separating the railroad from private closes between public roads or highways.

If then defendants were bound to guard their road by fences or other sufficient precautions at the crossing in question, as I think they were, it appears the plaintiff's horse escaped from his close, though surrounded with a lawful fence, and then crossed one highway into another leading to the defendants' railroad ; and that for want of guards either at the sides or across the railway, the horse escaped into and upon the line of the route thereof, and having wandered upon the track some distance from the point of intersection, was accidentally run over by a locomotive engine of defendants and killed.

It seems, therefore, if my view be correct, that it was the defendants' fault that the horse got where it was, and that being authorized to cross the highways only on the terms of sufficiently fencing the line of their route, and not having done so, the facts amount to a case of negligence, entitling the plaintiff to maintain this action.

The horse seems to have been lawfully on the highway, as against the defendants, according to *Fawcett v. The N. Mid. Railway Co.*, (16 Q. B. 610), however, at large in violation of municipal regulation of police.

McLEAN, J.—In this case a verdict was taken at the last Niagara assizes for the plaintiff, subject to the opinion of the court as to the liability of the defendants on certain facts admitted and agreed upon at the trial. The plaintiffs horses escaped from a field sufficiently enclosed with fences under the township regulation, at a distance of two miles from the line of railway. A road leading past the field,

intersects the railroad track, and no fence was erected at the intersection to prevent cattle from getting on the line of the railway. The horse was killed on the track on the night of the 6th of July, by the locomotive proceeding with a train of cars at the rate of about 18 miles an hour, without any negligence on the part of the conductors of the train, the horse not being seen till too late to prevent the accident. The question is, whether from the want of fences at the intersection of the railway and public road, which it is contended the defendants should have put up, the defendants are liable to pay for the horse which was killed on the railway track—at some distance from the public highway.

The first act of incorporation under which the present Great Western Railway Company was organized, was passed in the year 1834; but by that act, the company was chartered under the name of "The London and Gore Railroad Company," with power to construct a road "to connect the town of London with Burlington bay, the navigable waters of the river Thames and also lake Huron." Amongst the powers given by the 6th section of the act to the company then incorporated, is the power to make, maintain, repair and alter any fences or passages under or through the said railroad, or which shall communicate therewith; and by the 9th section, the company is authorized, whenever it shall be necessary for the construction of their railroad or way, to intersect or cross any stream of water or water course, or any road or highway lying on the route between the town of London, in the London district, and lake Ontario; Provided the corporation shall restore the stream or water course, or road or highway, thus intersected, to its former state, or in a sufficient manner not to impair its usefulness; and shall moreover erect and maintain, during the continuance of the corporation, *sufficient fences upon the line* of the route of their railroad or way.

By the 8th Vic., ch. 86, the first Act was revived, subject to certain provisions therein contained, and it is declared in the 1st section, that the 4th Wm. IV. ch. 29,

shall be in full force and effect as if the several provisions thereof were therein repeated and re-enacted, and the name of the company was changed from "The London and Gore Railroad Company," to be "The Great Western Railroad Company." By the third section of this Act, the Company have power to make or continue their railroad from the town of London to Point Edward, at the foot of lake Huron, and to the Detroit river, and to any point on the Niagara river; and it is provided that they may compromise and agree with the owners of any lands upon which they may determine to construct such railroad—for the purchase of any lands they may require, or for any damage done, in the same manner as is provided by the Act thereby revived (4th Wm. IV. ch. 29), in cases of the same kind. Then by the 7th section, it is declared that the provisions of the 25th section of the Act thereby revived, shall apply to that Act and to the privileges thereby granted, as well as to the said Act and the privileges granted by the same. There are no other provisions of the revived Act, declared to be applicable to the road, authorised to be made under the 8th Vic., ch. 86, nor is there any express authority given to the company in making that road to cross public highways or streams, or any terms prescribed on which the privilege of crossing them is conceded. It may have been intended, and the presumption is that, it was intended that the provisions of the ninth section of the former Act, should govern with respect to the whole extent of road authorized to be made; but when we see that specific sections of that Act are specially introduced and made to apply to the objects of the reviving Act, the omission of any reference to the objects provided for in the 9th section, cannot safely be ascribed to accident; but if we were at liberty to act upon such a presumption, the question is not what the legislature *intended to do*, but *what they have done*. The several provisions of the 4th Wm. IV. ch. 29, being re-enacted and introduced as they stand in the original Act—the company has power to make the road therein specified, subject to the terms and conditions expressed; without such intro-

duction and incorporation of that Act with the 8th Vic., ch. 86, there would be no such power conferred. The terms on which the line of road originally contemplated, was to be made, are specified, but no such terms are prescribed as to the extension or continuation of the railroad from the Town of London to Point Edward and the Detroit river, and to the Niagara river. An authority to make the road between those several points, is given by the third section, and the mode of acquiring the necessary lands is pointed out by the same section; but there is no duty required of the company in making fences or in restoring public highways or streams, which it might be necessary to pass on the route. It may be said that there is no express authority given to cross highways or streams, and that without the provisions of the 9th section of 4th Wm. IV. ch. 29, they would have no authority to do so; but when a power is given to make a road from one point to another, it appears to me that authority is conferred to cross rivers or highways which lie between these points; and the absence of any restrictions as to the mode in which they may be interfered with, however much to be regretted, cannot affect the authority and power to make the road. Under these circumstances, I am of opinion that the provisions of the 9th section, 4th Wm. IV. ch. 29, which are the only provisions relating to fencing in any of the Acts, do not apply to the road on which the plaintiff's horse was killed. I am strengthened in this opinion, by observing the care with which the *whole* of the provisions of that Act are, as far as they are applicable, introduced into the Act (16 Vic. ch. 101), "to incorporate the London and Port Sarnia Railway Company." By the eighth section of the latter Act, *all* the provisions of the Act to incorporate the London and Gore Railroad Company, and the Acts reviving, amending or extending the same, in force at the time of the passing of the Act, and not inconsistent with it, are incorporated with the Act, and declared to extend to the Company thereby constituted, and the railway which they are empowered to make as fully and effectually as if the said provisions were therein repeated and re-enacted

with respect to the said company and the said railway. Had such a clause been introduced into the Act 8th Vic., ch. 86, the intention would have been too manifest to admit of any doubt; but when some only of the provisions of 4th Wm. IV. ch. 29, are referred to and introduced, I cannot take upon myself to say that the *whole* have been so introduced. But if that must be assumed, still I am not prepared to say that these actions can be maintained—for the question still remains whether the fencing required to be made under the 9th section 4th Wm. IV. ch. 29, includes the fencing across public highways where they intersect the line of railroad. I am of opinion that it does not. When the legislature made it incumbent on the company to erect and maintain sufficient fences upon the line of the route of their railroad, the description of fences to be made and maintained was not specified; and I cannot assume that it was intended to have one kind of fence at the crossings of public highways, and a different kind to separate the possessions of individuals from the line of railway. The fences are required to be sufficient, and it may be said that they must be sufficient for all the purposes for which they are required; sufficient to protect the public at crossings, and to protect individuals in the enjoyment of their properties adjoining the line of railway. To protect the public at crossings, it is obvious that a different fence would be necessary from that which would be sufficient in reference to private properties. A fixture erected across a public highway would be a nuisance—a fence with gates to be opened or shut for the accommodation of passengers, would be equally a nuisance, though of a minor degree, and, unless sanctioned by law, would be equally liable to be indicted. It would be an obstruction in the free use of a highway, and no fence could be constructed which would not, to some extent, interfere with the enjoyment of it. Any number of gates would not remove the objection. Now I do not think that any person can be at liberty to put up and maintain, across a public highway, any species of obstruction which shall in law amount to a nuisance, without some express provision of law to sanction it. Had

the legislature intended to exact from the railway company, the making of fences across the public roads, they would, as in the case of the Ontario, Simcoe and Huron Railroad Company, have specified the kind of fences to be erected, and the manner in which they must be attended and kept for the public convenience. The absence of any express authority to fence across a public highway, and the want of any provision whatever for keeping such highway open for public purposes, if fenced, satisfy me that it never was contemplated that the railroad company originally chartered, should do more than to construct fences along their line of road to separate it from the properties through which it was to be made. On these grounds, I think the verdict for the plaintiff should be set aside and a nonsuit entered.

RICHARDS, J.—I concur in opinion with the Chief Justice, which, as well as the judgment recently pronounced by the learned Chief Justice of the Court of Queen's Bench in Upper Canada, in *Renaud v. The Great Western Railway Company*, convinces me that under those acts of incorporation, the defendants are compelled to fence the line of their road where it crosses public highways.

The general doctrine laid down and acted on in England is, that charters granted to companies like the defendants, are bargains between a company of adventurers and the public, and in discussing the effect of these charters, courts should interpret them most favorably to the public. The words introduced in the ninth section of 4 Wm. IV. ch. 29, by way of proviso—are, that the company “shall moreover erect and maintain, during the continuance of this corporation sufficient fences upon the line of the route of their single or double railroad or way.” It seems to me that the object of the legislature was to compel the company to fence their road, with a view to prevent accidents which would cause injuries to persons and property. The objection, that they could not put a fence across the Queen's highway, without being guilty of a nuisance, is obviated by shewing that they may put the fence or gate across their own line of road, which, when opened, would be along

their line. The necessity for some means to prevent injuries arising from the want of fences, is quite as great and obviously as necessary, where the route of the railway crosses the public highway as any where else, if not more so; and I cannot suppose that the legislature did not intend to compel the company to take such steps as would prevent accidents and injuries at these crossings. As I am of opinion that the company were bound to fence the line of their road where it crosses the highway, it seems to me on the authorities already referred to, and the facts submitted, that plaintiff is entitled to the judgment of the court.

Per cur.—Rule discharged.

BELLAMY V. THE CITY OF HAMILTON.

Corporation, liability of, as to sewers, &c.

Plaintiff being possessed of a close, which, in its natural state, was low and swampy, with a water course running through it; the defendants acting under the statute 13 & 14, Vic. cap. 15, turned the course of a stream above plaintiff's close into the water-course running through plaintiff's close, whereby the volume of water was increased, and the culvert erected by defendants below the plaintiff's close, being too small to carry it off, the water backed up on Plaintiff's premises; and, that from the two streams being united, the drain through plaintiff's close was unable to carry off the water, and the plaintiff's premises were flooded; but it appearing at the trial that the plaintiff had altered the natural course of the stream through his close, making it much narrower than in its natural state, and placed an iron grate at the upper end, and that the drains and improvements of private individuals would increase the water; and there being contradictory evidence as to whether the damage was occasioned by acts of the defendants, or by the plaintiff's own acts; the court refused to set aside a verdict for defendants.

Writ issued 8th September, 1854.

CASE.—Declaration states, before and at, &c., plaintiff was possessed of certain lands and dwelling houses, and buildings thereon in the City of Hamilton, called lots Nos. six, seven and eight, in Price's survey on Main Street, in the said city, and in which house, &c., plaintiff resided with his family, and that plaintiff was and is of right entitled; that the waters which should in the natural course and flow thereof, flow into and upon the said premises of plaintiff, and the waters collecting and being in and upon the same should be drained and carried through the said premises, and away from the same by and through a drain in the said City of Hamilton, passing

through and from the said premises, and that divers large quantities of said waters to wit, &c., were of right being drained and carried through the said premises, and away from the same by and through said drain ; yet defendants well knowing, &c., to wit on the first day of January, 1849, and on divers days, &c., wrongfully and injuriously made and caused to be made and constructed certain drains, watercourses, excavations, mounds, heaps of earth elevations and depressions of the surface of the soil, in the said City of Hamilton, near to the premises of plaintiff, and near to and in and across the said drain, and near to and in and across certain other drains and water-courses in the said city, which said last mentioned drains and water-courses communicated with the said first mentioned drain, and in and upon certain lands in said city, near to each of the said drains, and wrongfully and injuriously kept and continued the same from &c. to &c., and made and caused to be made, &c., in similar situations and positions within the said city, to the situations and positions of the said drains, water-courses and excavations, &c., certain other drains, water-courses, excavations, &c., in certain other parts of the soil in the said city, so carelessly, negligently, unskilfully and improperly, and so keeping and continuing the same, that thereby large quantities of water, dirt, filth and rubbish then flowing, and being in the said city of Hamilton, were caused to flow and be deposited into and upon plaintiff's lands, dwelling houses and buildings aforesaid, and thereby choaked the plaintiff's drain first mentioned, and incumbered, overflowed, saturated and damaged his aforesaid premises, whereby the same were rendered less fit for use or habitation, and plaintiff and family incommoded in the use thereof, &c.

Pleas. First—General issue, per statute.

Second—Plaintiff not possessed.

Third—Plaintiff not resident thereupon.

Fourth—Plaintiff not entitled of right that the water should flow as alleged.

Fifth—As to so much of the declaration as charges making the drains, &c., and continuing them, and thereby

causing small quantities of water to flow on said premises of plaintiff, &c., a justification under the 13 & 14 Vic. cap. 15, to repair certain streets in the said city, which having been formerly vested in the commissioners of public works, were by that act transferred to the defendants, doing no unnecessary damage, &c.

Sixth—To whole declaration, and similar to fifth plea.

Replication. Takes issue on first, second, third and fourth pleas ; to so much of fifth and six pleas as related to one of the drains, and the description of work therein confessed and attempted to be justified, *de injuria* ; and as to residue, excess ; and also new assignment—that plaintiff brings his action not only for the grievances attempted to be justified, but others.

Rejoinder. Takes issue on the replication of *de injuria* to fifth plea, traverses the excess, and to the new assignment pleads.

First—General issue per statute.

Second—Justification similar to fifth plea.

Third—Justification similar to sixth plea ; that the streets and drains required repairing ; that defendants as in duty bound did repair, and in so doing did necessarily and unavoidably commit the grievances, &c., doing no unnecessary damage. As to replication to sixth plea—demurrer for duplicity, &c.

Surrejoinder. Plaintiff joins issue in law and in fact, except as to second and third pleas to the new assignment, as to which the defendants say they acted in asserting a right to an easement in plaintiff's premises ; that plaintiff was possessed in fee ; that defendants had no right to the easement stated, nor to any easement, but encroached on plaintiff's dwelling-house, without his consent in writing, with special traverse *absque hoc* that defendants committed such, the grievances for the purposes in such plea alleged *modo et forma*. The declaration alleges plaintiff's right, that the waters upon his close should pass unobstructed through a drain leading therefrom and complains,—

First, That defendants in the making of other drains in other situations.

Second, And by making other drains carelessly, negligently, unskilfully and improperly, large quantities of water, dirt, filth, &c., were caused to flow and remain upon plaintiff's said close, and the said first mentioned drain was choked, and plaintiff's premises overflowed, incumbered and damaged, &c. The pleas deny plaintiff's possession of or residence in the premises, his right that the water should flow as alleged, or defendants' being guilty of the grievances. That what defendants did was legally authorised by the statute, and done in repairing the streets and drains, whereby they did necessarily and unavoidably commit the grievance complained of, doing no unnecessary damage. The result of the pleadings seems to be that the gist of this defence is traversed by the plaintiff and put in issue.

At the trial the evidence was received on both sides with a view to the substantial merits of the case. A plan referred to (not with the exhibits) has been produced. The evidence represents that plaintiff's close was originally low, swampy ground, and formed part of a swale or occasional water-course, through which surplus or flood waters from higher grounds escaped and passed towards the lake : that plaintiff became proprietor about ten year ago, and has since more or less raised and improved the premises, and within a few years erected several dwelling houses thereon, now forming part of the City of Hamilton : that he had himself facilitated the drainage of his own land by a ditch or drain leading from the southern or upper part of his land, on Main Street, through his premises, and thence onwards towards King Street, below or north of the plaintiff's close : that a former culvert, on King Street, west of the front one, had been stopped up by defendants, and that the present one in King Street helped to drain the plaintiff's premises, though not immediately adjoining : that the waters of two principal streams united at King Street,—the one already mentioned running directly through the plaintiff's close, and the other called the O'Reilly stream, which formerly passed King Street through the culvert that was stopped, but which being turned, its current ran eastward along King

Street until its waters united with the waters of the first mentioned stream at the present culvert through King Street: that the O'Reilly stream passed to the westward of plaintiff's premises, from south to north; but that both the aforesaid streams increased, by other small tributary channels, formed at times too great a body of water to escape through the King Street culvert rapidly enough, and were by reason of the smallness of that culvert impeded in their passage, and the water backed up against and upon the plaintiff's premises.

That the plaintiff some time before the times when &c., had covered over his drain and made a close sewer of it, and placed an iron grate at or near its entrance from Main Street, to check floating rubbish from getting in and clogging it; and that by reason of the defendants' said drains and culverts more than the natural body of water was brought down to the plaintiff's close at Main Street, whereby his drain became filled and overflowed the surface of his land; wherefore the plaintiff complained that by reason of the increased quantity of water brought down upon his close from above, by Main Street, and through the Main Street culvert, his drain was filled, and overflowed his premises, and that the culvert or escape at King Street below being too small to allow the waters led thereto to pass through it with sufficient rapidity, back-water was caused upon his premises, and that by the combined effects he was seriously injured and damnified. That the city authorities have from time to time graded and improved the streets by levelling and raising by surface drains and culverts, and otherwise, the effect of which is to admit of accumulating waters flowing into and upon and past the plaintiff's close, in a straighter channel, and therefore faster than formerly. But it was also given in evidence that the plaintiff had not left his close in its natural state, but had raised it and narrowed the channel for water to escape by a drain or culvert, which was obstructed at the upper end, and by an iron grate at Main Street, and was smaller in size than the culvert that led to it, and which also was diminished in its size within and between the points of

entrance and escape for the water in the line of his own close. Likewise, that the works or improvements of private individuals tended to increase the flow or volume of water at certain times, as well as to contaminate the waters above the plaintiff's, and to impede their escape below.

The learned judge who tried the cause (*Draper, J.*,) said plaintiff's case was rested on two principal grounds—

First, That the defendants wrongfully conducted excessive quantities of water upon plaintiff's close from above by the culvert or side drains, or across Main Street; and

Second, That they wrongfully caused back-water from King Street upon plaintiff's land.

It was left to the jury to determine whether water had been wrongfully diverted from other parts on to plaintiff's land to his prejudice, the evidence in support of which was the grading of the streets, &c.; and the jury were told that the corporation, in levelling, grading and draining, were discharging duties for which they were created: that *primâ facie* such acts were lawful, and could only become actionable by being so executed as to injure the plaintiff, and if that was established, plaintiff was entitled to recover some damages. But with regard to such injury, and the damages resulting therefrom, there was evidence that plaintiff had by works on his own land (a sewer and iron grating in it) obstructed the flow of the water which was represented to be thus held back in and upon Main Street, and so overflowed and ran into plaintiff's house; and that if the jury found that by so obstructing the water which naturally flowed over his land, he has contributed to his own injury, he cannot recover. Further, as to damages—that if the water, which in its natural channel flowed through plaintiff's land, was in its course made foul by filth thrown into it by private individuals, for whose acts defendants were not liable, the damage resulting therefrom should not be allowed in this action; and that the grating which obstructed such filth would naturally add to the nuisance, and that was asserted to be the plaintiff's own act. As to the back water from King Street, whether the result was caused by acts for which defendants were liable depended upon the

opinion of the jury whether the insufficiency of the culverts or drains made by or remaining under defendants' control caused back-water on plaintiff's close, for that they were not liable if caused by the smallness of the sewers or channels made by proprietors through their own lands. But if the injury arose from insufficient culverts made by or under the control of the defendants, then plaintiff should have a verdict for such injury.

The jury found for defendants.

In the following term, (Michaelmas term, 18 Victoria,) *Martin*, for plaintiff, obtained a rule on defendants to show cause why such verdict should not be set aside, on the grounds of misdirection, perversity, and of being contrary to law and evidence and the judge's charge, and contrary to the weight of evidence, and upon affidavits filed—

The affidavit is plaintiff's own, and gives a circumstantial statement of the state of his close from the beginning of the improvements made thereon, of the works of defendants upon the public streets, and of the way in which they prejudicially affect him, by flood-water and by back-water.

Vankoughnet, Q. C., showed cause, and contended—

First, That the judge's charge was not excepted to at the trial, and cannot now be objected to or made the ground of an application.

Second, That the charge was not against plaintiff, but left the case open to the jury.

Third, That the affidavit is only a repetition of what was proved, or a statement of what ought to have been proved at the trial.

Fourth, That the verdict is not against law or evidence, but consistent with both.

Fifth, And therefore could not be perverse.

Sixth, On the merits, that the defendants have authority to drain the city—that their culverts were capacious enough—but plaintiff's not so. That plaintiff had no right to prevent the defendants leading off the flood-waters by the natural course, and should enlarge his culvert, or otherwise facilitate the escape through his close.

That it was left to the jury whether defendants had committed an excess to plaintiff's injury, and they had negatived it.

He referred to the *City of Toronto Water Works v. the City of Toronto*.

Martin, in reply, discussed the whole case at much length, and contended that the charge was excepted to.

That the affidavits filed by the plaintiff are not answered, and that they relate the circumstances in more detail than appears in the judge's notes.

That the verdict was perverse, being clearly against the weight of evidence, which showed that increased quantities of water, beyond the natural flow, were both led to and forced back upon plaintiff's close.—*Mills v. Dixon*, 3 U. C. C. P. R. 422.

That the plaintiff relied on two grounds—

First, The defendants' acts illegal in themselves; if not,

Second, That there was negligence, &c. That defendants enjoy no right except by statute, and that no defence pleaded meets the evidence as given at the trial—*Brown v. Sarnia*, 11 U. C. Q. B. R. 87; *Benson v. Welby*, 2 Saund. 155: that the statute should be pleaded and set out—the special matter being in excuse only and not denial—*Richards v. Easto*, 15 M. & W. 244. That it was misdirection to hold that if plaintiff contributed to the effects complained of he could not recover—*Dean v. Clayton*, 7 Taunt. 489; *Bird v. Holbrook*, 4 Bing. 628; *Davies v. Mann*, 10 M. & W. 548; *Bridge v. The Grand Junction Railway Co.*, 3 M. & W. 244; *Adamson v. M'Nab*, 6 U. C. Q. B. R. 127; *Lynch v. Nurdin*, 1 Q. B. 29.

That if the ruling was right the verdict is wrong, and the ruling was wrong upon the evidence in reference to the pleadings—8 Ex. R. 69; *Bell v. The Hull & Selby Railway Co.*, 6 M. & W. 705; *Doe d. Parr v. Roe*, 1 Q. B. 700; *Draper*, 72; *Grant on Corporations*, s. 279.

That the plea does not say that what the defendants did was in fact within the statutes relied on by them—*Johnson v. Williams*, 6 Ex. R. 314; 21 L. J. Ex. 9. 11; *Peterson v. Moody*, 12 U. C. Q. B. R. 343; *Matthews v. The West*

London Water Works Co., 3 Camp. 403 ; Little v. Ince, 3 U. C. C. P. R. 1.

That the 16 Vic. cap. 181, s. 35, was not pleaded, and would not justify ; that no by-law was shown, which was necessary, and should not be contrary to the law of the land—*Ib.* s. 33 ; s. 60, Nos. 1, 2, 3 ; s. 107, Nos. 5, 3, 44 ; s. 31, Nos. 1, 5, 9, 22 ; Lafferty v. Stock, 3 U. C. C. P. R. 9 ; Wright v. Williams, 1 M & W. 77 ; Dudley Canal Co. v. Grazebrook, 1 B. & Adol. 69 ; Trafford v. The King, 8 Bing. 204 ; Dimes v. the Grand Junction Canal Co., 9 Q. B. 506 ; Stracy v. Nelson, 12 M & W. 540 ; Smith v. Bell, 10 M. & W. 391 ; Perry v. Skinner, 2 M. & W. 476 ; Becke v. Smith, 2 M & W. 195 ; Moon v. Durden, 2 Ex. R. 37 ; Brunt v. Thomson, 2 Q. B. 789, 5 M & G. 109 ; Taylor on Evidence, 18. That defendants rely upon the 13 & 14 Vic. cap. 15, and cannot take refuge under the 16 Victoria, cap. 181, sec. 35.

That the streets are not averred or proved to be within the defendant's jurisdiction, and may be government streets not yet proclaimed off—Little v. Ince, 3 U. C. Q. B. R. 555 ; Henly v. The Mayor of Dyme, 5 Bing. 91, 20 L. J. Q. B. 293 ; The King v. The Bristol Dock Co., 6 B. C. 181 ; The Queen v. The Bristol Dock Co., 2 Q. B. 64 ; The Queen v. The Great North of England Railway Co., 9 Q. B. 315 ; Turner v. The Sheffield & Rotherham Railroad Co., 10 M. & W. 425 ; Bishop v. North, 11 M. & W. 418 ; Wells v. Ody, 1 M. & W. 460 ; Wood v. Wand, 3 Ex. R. 777 ; Russell v. The Men of Devon, 2 T. R. 667 ; Carpue v. The London & Brighton Railway Co., 5 Q. B. 747, 10 Ju. 571.

MACAULAY, C. J.—After going carefully through this case, I do not see any sufficient ground for disturbing the verdict. The necessity of a by-law to authorize what the defendants did was not a question raised on the pleadings. The defendants justify what they did under the statutes 13 & 14 Vic. cap. 15, irrespective of any by-law ; and I do not think it was proved that they did anything they were not authorized to do by the statute and common law—entrusted and charged as they were with the maintenance and repair

of the streets of the city under their superintendence, of which the street in question was one ; at least nothing appears to the contrary, and if excepted, the exception ought to have been shewn. How far the different issues had been established was for the jury, on the whole evidence.

Whether the plaintiff by his own acts was contributing to his own damage to an extent destructive of his right of action, depended upon the degree to which they so operated. The jury seem to have been of opinion that the causes which produced the injurious consequences complained of were mainly imputable to him, and that the defendants were not implicated to a degree that enabled them to discriminate and ascribe to their acts the damages sustained by the plaintiff to a tangible and definite amount ; and under such circumstances, I do not think the verdict can be set aside for misdirection on this point. The weight of evidence seems to be in support of the conclusion to which the jury came.

The plaintiff had made material changes or improvements upon his own premises of late years, as the defendants have done in the public streets running east and west, north and south in the vicinity thereof, and in the existing state of the works public and private, the jury expressed in the verdict that they could not attribute to any specific extent the inconvenience and injurious consequences experienced by the plaintiff to the defendants' acts to a degree entitling them to be regarded as wrongful or prejudicial to him in relation to the grievances of which he complains. We cannot say that on the whole evidence we think the jury ought to have found differently than they did, or that the verdict is against law, or that in reference to the evidence there was misdirection ; and under such circumstances do not think we are at liberty to disturb the verdict.

McLEAN, J.—This case was tried before Mr. Justice Draper at Hamilton, at the last autumn assizes, and a great deal of testimony was adduced to shew on the part of the plaintiff that he had sustained injury by reason of the water being thrown upon his premises from the insufficiency of

the sewers constructed by the city in improving the public streets. On the defence, witnesses were called to shew that the ground on which plaintiff has built was at one time a low, marshy piece of ground, and formed the channel of a stream or streams which ran through it in their natural state. These streams have some of them been diverted into the city sewers; and the plaintiff alleges that the insufficiency of these sewers to convey off the water which has been turned into them has, by causing the water to flow back, occasioned him the injury complained of. The testimony was conflicting as to the cause of the injury; but it was very manifest that though water may have been occasionally thrown back on plaintiff's premises by reason of its not being carried off sufficiently fast by the sewers, the construction of the sewers and the diversion into them of the water which used to flow over his ground had rendered that ground of value for building purposes, so that plaintiff had erected several houses upon it. The case was submitted to the jury by the learned judge with an unexceptionable charge; and, after hearing all the evidence, and with a full knowledge of the circumstances, the jury rendered a verdict in favor of the defendants. Had it been given in favor of the plaintiff, we could not say that there was not sufficient evidence to support it, but at the same time his right to recover is not so clearly established by the evidence that we must hold that the verdict ought to have been rendered for him. If another trial were granted, it is not probable that any additional light could be thrown on the subject, and, as on the last trial, it must rest with the jury to decide on the conflicting statements of witnesses. Under these circumstances, should a verdict be rendered for the plaintiff, it would necessarily be against some portion of the evidence, and we should find it as difficult to decide its correctness as on the present occasion. I think therefore that we cannot interfere with the verdict, and that the rule must be discharged.

RICHARDS, J., concurred.

Per Cur.—Rule discharged.

YOUNG V. BABY, SHERIFF, &c.

Sheriff—Execution, priority of.

Defendant after the receipt of plaintiff's writ, received another writ at the suit of one S. against the same debtor, and under which last writ the defendant seized a lot of land owned by such debtor, but upon which S. had a mortgage to secure the rent on a lease from him to the debtor, and that S.'s judgment was for arrears of rent secured by such mortgage; that S. bought the land for the amount of his judgment, and paid the sheriff's fees. At the trial, however, it not appearing whether defendant sold only the equity of redemption, or the debtor's interest in the land exclusive of the mortgage, the court set aside a verdict for defendant and granted a new trial, with costs to abide the event.

Case for false return to *Fi. Fa.* against lands.

First count states judgment recovered by plaintiff in the Court of Queen's Bench, on the 16th of December, 1852, against James Gibson for £79 10s. 1d.—that *Fi. Fa.* against lands issued on the 12th of February 1853—tested 7th February, 16 Vic., directed to defendant, then sheriff of Essex and Lambton, returnable last of Hilary Term, 1854; endorsed £65 6s. 5d. debt, £14 3s. 8d. costs, &c., delivered to defendant 12th of February, 1853. That defendant was sheriff, &c., and had execution of said writ. That there were lands of said Gibson within his county &c., whereof defendant could and might and ought to have levied the monies so endorsed, &c., whereof he had notice, &c.; yet defendant did not levy the same or any part thereof, but neglected and refused so to do, and falsely returned said writ, that said Gibson had no lands whereof, &c.; whereby, &c.

Second count states a judgment and *Fi. Fa.* similar to the 1st count, then avers that by virtue of such writ defendant seized and took in execution Lot No. 3, 6th concession Plympton, 200 acres, lands of said Gibson, of the value indorsed on said writ, and levied the same thereout, yet falsely returned that said Gibson had no lands, &c.

Third count states judgment and *Fi. Fa.*, as in first count, then alleges another *Fi. Fa.* against lands of said Gibson at the suit of one Patrick Smith, delivered to the defendant on the 12th of March, 1853. That Gibson had lands, to wit, Lot No. 3, 6th concession Plympton, &c., more than sufficient in value to satisfy both writs, of which defendant had notice, out of which defendant could and might and ought to have levied the monies so endorsed on

plaintiff's writ; yet defendant seized said lands under Smith's writ, and sold the same for a much less sum than they were worth, and then he might and ought to have obtained and paid the amount realized to said Smith, whose writ was subsequent to plaintiff's, and wrongfully returned to plaintiff's writ that Gibson had no lands whereof he could cause to be levied the amount of plaintiff's writ, &c. ; by means whereof, &c.

Pleas—first, Not guilty.

Second, Leave and license of plaintiff.

Third, To first count—That after receipt of said *Fi. Fa.* plaintiff's attorney instructed defendant to seize thereunder Lot No. 3, 6th concession Sarnia, which he did, but that it was not Gibson's land; that soon after receiving plaintiff's writ defendant received Smith's writ, endorsed to levy £151 10s., &c., under which defendant, after the first mentioned seizure, seized said lot 3, 6th concession Plympton, under Smith's writ, and levied the amount thereout, and paid the same to him, and that Gibson had no other lands whereof, &c., and defendant returned plaintiff's writ as alleged; and that by the direction, leave and license of plaintiff's attorney, he neglected to levy the amount of plaintiff's writ.

Fourth, To second count—Traverses the facts alleged, &c.

Fifth, To third count,—Similar to third plea to first count.

As inducement to a special traverse, that the lands were of greater value than sufficient to pay both writs, and that defendant wrongfully sold the same for less than he might have done, and wrongfully returned plaintiff's writ as alleged.

Replication, — First similiter to first, fourth, and fifth pleas.

Second, To second plea *de injuria*.

Third, To third plea, admitting *Fi. Fa.*, and delivery to defendant; *de injuria* as to residue.

At the trial the plaintiff proved the judgment and *Fi. Fa.* as stated in the declaration, and its delivery to defendant. The plaintiff's attorney, being called as a witness for plaintiff, stated, on cross-examination, that he had

caused a lot of land to be advertised in defendant's name, under plaintiff's writ against Gibson, as Gibson's land, being the same number and concession, in Sarnia, as the lot afterwards advertised by defendant under Smith's writ. That in the autumn of 1853, and before the return day of the writ, such attorney had a conversation with defendant, when defendant said that he had, or intended to, advertise lands in Plympton, and that he had another writ at the suit of Smith upon which the attorney said there must be some mistake, as Gibson had lands in one township only. The attorney said he gave him to understand that at all events he expected plaintiff's writ to stand first, and that defendant seemed to agree with the attorney that there was a mistake somewhere, but he could not say defendant knew the lands which the attorney had advertised were not Gibson's; that the said attorney had another subsequent conversation with defendant before the sale under Smith's writ, but he could not say whether before or after the return day of plaintiff's writ, when he the attorney said he was sure it was a mistake, and that he considered the plaintiff's writ should be first satisfied, and thought that defendant must have so understood him to insist that plaintiff's writ was entitled to priority. That he told defendant he would look to him, and supposed the plaintiff's writ entitled to precedence, whether the lands were advertised to be sold under it or not.

Patrick Smith, also called by the plaintiff, said he had taken a mortgage on the lot in Plympton for three hundred pounds, to secure the rent of a lease from him to Gibson, and afterwards became assignee of a prior mortgage for £40, which he was obliged to obtain to protect himself; that the judgment was for arrears of rent, &c., secured by the mortgage for £300; that the sale took place in May, 1854, when he became the purchaser under his own writ, having bid £161, or so; that he bid it up as high as his own debt and costs, for the amount of which he was entitled to credit; that he paid sheriff's fees; that Gibson owned the land on the 12th of February, 1853, seemingly subject to the mortgages; that defendant sold the interest of the mortgagor. A Gazette, of 25th of February, 1854,

was put in, to shew the advertisements, and a memorial of a deed executed by defendant, admitted as evidence of his admission under seal as against him, but not received as proof of the deed referred to therein, the absence of such deed not being accounted for.

A witness who lived on 100 acres of the lot number 3, 6th concession Plympton, said that 100 acres was worth £300, and the whole lot was worth £375 to £400, but he could not say what it was worth last May.

For defendant it was objected : 1st, that he was entitled to notice of action, and that the proof of the sale alleged was insufficient—overruled.

It was left to the jury to decide whether Gibson had any lands, &c., out of which the defendant did, could, might, or ought to have made the plaintiff's debt or any part of it, assuming it to be entitled to priority.

To this it was objected by plaintiff's counsel that the defendant's own acts proved there were such lands, and that no mortgage or incumbrances had been proved ; but it was ruled that the mortgages were proved, that Smith being called by plaintiff to prove that Gibson had lands, stated that the sale to him was under a judgment secured by a prior mortgage, and that there were two mortgages, one for £300, to secure rent, &c., under a lease which was the ground of the judgment, and another for £40, which he Smith had bought ; that it was a matter proper to be further considered, whichever way decided at *Nisi Prius*, and it was so left to the jury, who found for defendant.

During last term, *Leith*, for plaintiff, obtained a rule on defendant to shew cause why such verdict should not be set aside and a new trial had, on the ground that the verdict is contrary to law, evidence, and the judge's charge, and for misdirection.

He contended that there was no evidence of the mortgages, not being produced, and no subscribing witness called : citing *Drew v. Lainson*, 11 A. & E. 537.

Davis shewed cause, and contended that there was proof of the mortgages : that Smith, being called by plaintiff, proved the sale to him under a judgment secured by the mortgage.

MACAULAY, C. J.—The plaintiff's right to recover seems to me to depend upon this consideration, whether the defendant sold only the equity of redemption or Gibson's interest in the land, exclusive of the mortgages to Smith for £161—that is, in addition to the mortgages; or whether it was the whole value of the estate, treating it as an unincumbered fee simple. If Smith bid only £161, as being part of his mortgage, then the plaintiff should be entitled to redeem him, or still to sell the equity of redemption; and if that has not been sold, then Gibson had an interest in this land that might have been, but was not sold.

If the sale included the equity of redemption, or was only the equity of redemption, the question is, how much did it sell for exclusive of the mortgages? Then, what was the exact sum due on the mortgages? and if less than Smith bid, how much less?

As mortgagee he is bound to release Gibson, and a stranger purchasing would be bound to indemnify him; *primâ facie* it must be intended that Smith bought Gibson's remaining interest at £161, and if so, nothing was done by plaintiff to entitle Smith's writ to priority.

We should see the mortgages and the defendant's deed to Smith, and be informed expressly what was sold by defendant, and for what Smith bid.

If the fee simple is fairly worth more than Smith bid, the plaintiff may reasonably complain that more was not made, unless as being a sale of the fee he is entitled to the priority, and therefore payment out of his execution. So far as we know, Smith may hold the land in fee without having paid anything for the equity of redemption. If so, then what was it worth beyond the amount due under the mortgage, for so far plaintiff seems entitled to priority? The questions are, admitting that the plaintiff was entitled to priority—

First, Whether Smith bid at the sale more than the amount secured and due to him on his mortgages, for if so, plaintiff would seem entitled to the surplus.

Second, If not, then whether the equity of redemption or Gibson's remaining interest in the land, was of more than

a nominal value over and above the amount due to Smith upon the mortgage, and if so, how much? and how much over and above the mortgages could and ought the defendant to have realized by the separate sale of Gibson's interest under the statute 12 Vic., ch. 73, for so much the plaintiff would seem entitled to recover.

McLEAN, J., concurred.

RICHARDS, J.—As far as can be ascertained from the evidence at the trial, it seems to me that the plaintiff is entitled to his priority, having first placed his execution against lands in the sheriff's hands. It is not shewn that he did anything which would have the effect of waiving or abandoning that right, and as far as appears he is entitled on that ground to recover in this action.

If the lot was mortgaged to Smith before the plaintiff obtained or registered his judgment against Gibson, or placed his execution in the sheriff's hands, as we are led to infer from the evidence, it is very clear that all the plaintiff had a right to expect from that execution would be the value of the equity of redemption—or, in other words, the value of the lands seized after paying off the mortgages and other incumbrance thereon prior to his own execution. What this may have been was not clearly shewn at the trial; the deed from the sheriff to Smith was not produced, nor were either of the mortgages under which Smith claimed: nor was it shewn satisfactorily what amount was actually due or unpaid to him on these mortgages. In the absence of these facts it is impossible to say that the *prima facie* case made out against the defendant ought not to prevail.

If on another trial it should be shewn that the equity of redemption of Gibson in the lands was of no value—or, to put it in another shape, that the lands were not worth more than the amount due upon the existing incumbrances thereon, which were prior to the plaintiff's execution—then a verdict should pass for the defendant on the first plea. The fact that the sheriff, on the sale of the land to Smith, had a bid from him to the amount of £160, at which sum

he Smith became the purchaser, in the absence of any clear explanation on the subject, would entitle the plaintiff to recover, because it would be presumed that that sum was bid for the equity of redemption; and under the third section of 12 Vic., ch. 73, he would be obliged to release to the mortgagor the debt for which the mortgage was given. But, should it clearly appear, as the evidence given on the last trial would seem to shew, although not distinctly, that the intended purchasers at the sheriff's sale were bidding for the fee simple of the land free from incumbrances, and that Smith was only to apply the sum that he bid on his judgment, which was for a part of the mortgage money, and that the fee of the land was, as I have before mentioned, of no greater value than the incumbrances on it prior to the plaintiff's execution, then the verdict should be for the defendant. We do not think defendant's return on the writ in favor of Smith estops him in this action from shewing that the interest in the land, which could have been sold under the plaintiff's execution, was of little or no value. If it were so, it would be carrying the doctrine of estoppel, which the law does not favor, to an unwarrantable extent, to work a gross injustice. I cannot see how the principle on which the doctrine of estoppel rests, can in any way apply between parties in relation to the facts of this case.

New trial, with costs to abide the event.

JARED O. THATCHER V. THE GREAT WESTERN RAILROAD COMPANY.

Plaintiff being a passenger in one of defendants' cars, the axle of the tender broke, and the tender and car in which plaintiff was were thrown off the track, whereby plaintiff's arm was broken.

At the trial, the defendants called the engineer of the train, who proved that he examined the axle shortly before the accident, when it appeared in good order. The jury having found a verdict for plaintiff upon this evidence, and with a charge favourable to defendants, the court refused to set it aside, on the ground that it was for the jury, on the evidence, to determine whether there was negligence on the part of defendants or not.

CASE.—Declaration states that defendants were proprietors of a railway in Upper Canada for carrying of pas-

sengers, &c., and received plaintiff as a passenger, to be carried for reward from Windsor to Niagara Falls: that it became defendants' duty to use due diligence; yet defendants, not regarding, &c., did not use due care, &c., but conducted themselves so carelessly and improperly in that behalf that by reason thereof, and improper conduct of the defendants by their servants, the railway car in which plaintiff was such passenger was thrown off the track, and thereby his right arm broken, &c.

Second count charges defendants as common carriers for reward, &c.

Pleas—1st. Not guilty to the whole.

2nd. To first count—Did not receive plaintiff as a passenger.

3rd. To second count—Did not receive plaintiff as a passenger.

At the trial it was admitted that in June last the plaintiff was conveyed in defendants' cars as stated; that when near Chatham the axle of the tender car broke, and such tender, as well as the car in which the plaintiff was, was thrown off the track, whereby plaintiff's arm was broken, &c. The plaintiff gave no further proof of negligence in the defendants.

On the defence the defendants' counsel called the engineer, who had been on the defendants' road as engine driver from the first, and who had charge of the locomotive engine on the day the tender broke down. He stated that when they left Windsor he had examined the engine and tender, that nothing went wrong with the engine: that he last examined at Chatham, two and a half miles from the place where the accident afterwards happened; that he examined the axle afterwards and found no flaw in it; that it was a new break straight through, just inside the wheel, and could not account for the accident; that it was the proper size, and he thought of wrought iron, though it might be a bad kind of it, and that it had been running for some time and constantly in use for two months, and he had no reason to think anything wrong: that they were not going more than fifteen miles an hour at the time, on a smooth road; that

he examined it as usual, saw no crack in it, and could see perfectly well that part of the axle, and for all he knew it was all right when he looked. That it (the engine and tender) was built at Manchester, in the State of New York : that there was nothing more than usual in the tender, nor more than a usual train.

The learned Chief Justice, who tried the cause, told the jury the defendants could only be held liable in case of negligence : that the axle breaking threw it on the defendants to shew that due care was taken to have proper carriages, and to ascertain from time to time that all was sound ; and that they were to say whether they found any want of skill or care on this occasion, or that the iron was of bad quality and therefore failed.

The plaintiff's counsel objected that there should have been evidence given of the sufficiency of the axle-tree, and as to the probable cause of the accident ; but the learned Chief Justice left to the jury the evidence of the engineer as applying to those points, observing that he could not say it was no evidence, or that other or better evidence could, or should, as a matter of legal necessity, have been given.

Read, for plaintiff, shewed cause, and contended that the accident was *primâ facie* evidence of negligence, and was not rebutted : that only one witness was called who did not prove any adequate cause to account for the injury reconcileably with the absence of any negligence or blameable insufficiency of the make on defendants' part. He cited *Grote v. The Chester and Holyhead Railway Co.*, 2 Ex. R. 251 ; *Christie v. Griggs*, 2 Camp. 81 : *Carpue v. The London and Brighton Railway Co.*, 5 Q. B. 747 ; *Curtis and Wife v. Drinkwater*, 2 B. & Adol. 169 ; *Grieve v. The Ontario Steamboat Co.*, 4 U. C. C. P. R. 387. That it was left to the jury as a question for their decision with observations favorable to the defendants, and they should abide by the result.

Galt, in reply, urged strongly that no culpability was justly imputable to the defendants ; that to hold them liable is to declare them liable as of course, for every accidental breakage of any part of their works, whatever care or pre-

cautions they may have used, or however apparently secure and sufficient; that the rule of law was correctly laid down by *Alderson, J.*, in *Sharp v. Greer*, 9 Bing. 457; and if applied to the facts in this case, the defendants were entitled to a new trial—*Witte v. Hague*, 2 D. & R. 33.

MACAULAY, C. J.—I can only say, that according to the view expressed by me in the case of *Grieve v. The Ontario Steamboat Company*, and referring to the cases mentioned in disposing of that case a few terms ago, I think the present formed a question for the jury; that in the absence of any explanations satisfactorily accounting for the accident, but with a charge favorable to the defendants, the jury were not satisfied it was a pure accident entailing no liability on the defendant, but felt the more satisfactory conclusion to be that there was negligence on their part in relation to the premises; whether as in regard of insufficient materials, workmanship, want of vigilance, overloading, mismanagement, or how otherwise not being expressed by them. The accident having happened unaccountably and without any proximate or active cause to account for it, constituting as the cases say some evidence of negligence, it rested with the defendants to explain and reconcile it with perfect innocence on their parts; and having failed to do this to the satisfaction of the jury, I do not see sufficient ground for sending the case to a second trial when the same evidence and no more might be again submitted to another jury. If a jury must decide on this evidence, I cannot say there is not evidence for their consideration; I think it was for them to decide on the evidence, and do not see any reason for disturbing their decision. That the axle broke without any sudden cause or emergency that we see, and that the plaintiff was seriously injured in consequence, are undisputed facts; and the jury have come to the conclusion that the evidence did not exonerate the defendants from blame. The rule will therefore be discharged.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

HENRY ARMSTRONG V. THE BEACON LIFE INSURANCE COMPANY.

Practice—Notice of trial.

Notice of trial being served on the defendants too late, and there being contradictory statements as to the agreement to take short notice, the court set aside a verdict for plaintiff and granted a new trial with costs.

This is a rule on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside for irregularity in the service of notice of trial, the said notice not having been served in sufficient time, and notice thereof given to plaintiffs, and on affidavits filed, with costs. Also, on affidavit of merits. The affidavit states that declaration was served on Monday, the 9th of October: defendants pleaded on the 16th of October, 1854, and issue was joined on the 17th: notice of trial served on the 18th of October, for the assizes at Kingston, on the 23rd of October same year, at which assizes the cause was tried and verdict for plaintiff, £122 damages: that the partner of the plaintiffs attorney was told it would not be accepted, and written notice thereof served on the 20th of October. Then, on the one hand, it is asserted that a clerk of the defendants' attorney had agreed on Saturday, the 7th of October, to grant time for declaring until Monday or Tuesday following, and not to take advantage of its not being served in time, as plaintiff's attorney intended to take the case down to trial at the then next assizes, and said it would make no difference if the notice of trial was served or not. This is peremptorily denied by such clerk; consequently there are opposing and conflicting statements on the subject. Had declaration been served on the 7th, the defendants would have been bound to plead on the 14th, and notice of trial on that day or the following Monday, the 16th, would have been in good time for the assizes on Monday the 23rd of October, but one day lost and it would be too late; and it was not served until the 18th. The plaintiff's affidavits strongly repel the alleged merits, so it depends upon the regularity of the proceedings. That the notice of trial was not in due time is clear, and the question is, whether it was nevertheless sufficient as having been accepted or delivered under a previous arrangement?

MACAULAY, C.J.—In the misunderstanding and conflict of statements which the affidavits before us exhibit, we see no satisfactory cause, except to give effect to this application, however devoid of merit the defence or the objection may be, and therefore to set aside the verdict. It is one of those disappointments that will sometimes attend proceedings to issue and trial when the assize day is rapidly approaching and the time for the necessary steps limited, unless a clear undertaking can be established.

The conflict of statements prevents its being clearly established here, and in such circumstances our course seems to be to ascertain whether the practice has been followed, and if not, to decide accordingly.

McLEAN, J., and RICHARDS, J., concurred.

Rule absolute, with costs.

THE ATTORNEY-GENERAL V. THOMPSON ET AL.

Customs duties—Entry of goods.

Defendants, residing in the United States, having contracted by letter with McP. & Co., of Toronto, Canada, to sell them brooms, laid down in Toronto duty free, shipped the brooms to Toronto, and sent an invoice to their agent in Toronto, valuing them at or near manufacturers' prices, and much under the price for which they were sold to McP. & Co., the brooms being entered for duties at the custom-house, Toronto, at such under rate.

Held, that such goods were liable to be seized, as being entered below the actual cash value in the markets in the country from whence they were exported, and that such value was not to be the manufacturers' wholesale prices, but the sale prices in the market from whence the goods were exported.

Information for condemnation of goods—"corn brooms"—seized as forfeited.

Plea—Not undervalued with intent to avoid payment of the duty, or some part thereof, on said goods, contrary to the statute.

It appeared in evidence that by letter dated from Buffalo (State of New York) 27th of July, 1854, addressed to Ross, Mitchell & Co., the defendants said they were prepared to execute orders for corn brooms in lots of 50 dozen—No. 3 at \$2, No. 4 at \$2.25, No. 5 at \$2.50, paid down—finished in good style; which means, No. 3 at 10s., No. 4 at 11s. 3d., and No. 5 at 12s. 6d. per dozen. That on the 2nd of August, 1854, R. D. McPherson & Co., of Toronto, wrote

to defendants in reference to the letter above mentioned, saying they were in want of some brooms, but would prefer if defendants could make arrangements to lay them down here (Toronto) duty paid, as they could enter them at manufacturers' prices something of course under their usual selling rates; and that McPherson & Co. would be willing to pay in proportion; also, that it would be somewhat of a saving in cost laid down here if defendants could make arrangements for freight with the steamer Peerless. That on these terms they (McPherson & Co.) would take 50 dozen each of the three kinds mentioned, with the prospect held out of taking more, &c. That defendants, by letter dated Buffalo, 9th August, 1854, addressed to W. Gorrie (a wharfinger in Toronto), defendants said they sent therewith bills of lading of goods as per statement above, and requesting him to pass the goods at the custom house, and collect the amount of duties and charges from Messieurs R. D. McPherson & Co., to whom he was to deliver the goods, and when convenient to send a statement of charges.

"W. G., Toronto, C. W.

"50 doz. corn brooms each—No. 3 \$1.56, No. 4 \$1.65,
No. 5 \$1.88.

\$253.50

14.20

\$267.70."

According to which the duties on the brooms at $12\frac{1}{2}$ per cent. would have been £8 7s. 4d.; at the prices stated in the defendant's circular, about one-third more. Mr. Gorrie entered them for duties at the price mentioned in the letter to him. On the same day defendants wrote to McPherson & Co. that they enclosed an *invoice* of merchandize amounting to \$356. $\frac{75}{100}$ bill of lading sent to Mr. Gorrie, with instructions to enter at the custom house and deliver to them.

The goods having been seized at the port of Toronto as entered under value, defendants, on the 30th of August, 1854, wrote from Buffalo to the inspector-general at Quebec that on the 9th they had shipped brooms addressed to W. Gorrie, with instructions to pay duties and deliver to

McPherson & Co., and stating that having undertaken to sell a large quantity of brooms for a manufacturer in that vicinity, they issued a circular to wholesale houses in Canada informing them of the fact, and soliciting orders, &c.; that McPherson & Co. had ordered 150 dozen, if delivered at Toronto duty paid; that they forwarded the brooms immediately to their agent here as above stated; and that the property belonged to them, and was at their risk till delivered according to their instructions. They disavow instructions or intention to defraud the customs. They then submit that the manufacturers' price, when manufacturers or their representatives were in the habit of entering goods, was the just criterion to be adopted, and usual, &c.; and remonstrating against custom-house officers, after precedents had been established by them and generally known, seizing on such frivolous grounds; also representing that they had at former periods entered both pails and brooms at the manufacturers' prices, &c., and in the present case, as on a former occasion, had entered brooms at \$1.56, while the price at Buffalo was \$2; wherefore they requested a release of the property.

S. L. Beste was called for defendants, and said he resided 10 miles from Buffalo; was a manufacturer of brooms, and sold them to defendants last summer at—No. 3 \$1.50, No. 4 \$1.63, and No. 5 at \$1.88; that prices fluctuated at Buffalo; that the brooms were of inferior quality; that he would have sold to others at the same prices for cash, and would sometimes take less than at others; that defendants had bought to sell again; that he believed that dealers in Buffalo advanced 25 cents a dozen on the manufacturers' prices (of which he spoke) when selling again by the dozen.

The jury found for the crown.

During this term *Robinson C.*, for defendants, obtained a rule to shew cause why the verdict should not be set aside and a new trial be had, as being contrary to law and evidence, and for misdirection and on affidavits filed.

1. Affidavit of W. M. Gorrie, disavowing any fraudulent design, and referring to a letter of R. D. McPherson & Co. to Mr. Meudell, collector of customs at Toronto, dated 14th

August, 1854, as correctly stating the practice of manufacturers in the United States in passing goods sold to customers in Canada. This letter advocates the principle and practice of manufacturers in the United States being entitled to enter goods here at their sale prices in order to be disposed of to their customers in Canada, &c.

2. Affidavit of R. D. McPherson and Robert Selby Cameron, his partner, disavowing any design to defraud the revenue, &c., and alleging that the price to be paid by them was at 60 days' credit, not cash.

3. Thomas Thompson and Robert H. Thompson, that on entering the goods in question nothing was done, concealed, or suppressed with intent and design to defraud the crown of revenue, &c.; that they acted in good faith, &c., and believed they were entitled to enter at the prices stated by them, &c.

No reason is assigned for Gorrie, McPherson, and Cameron not being called as witnesses at the trial, if material.

Mr. *Richards* (pro Reg.) shewed cause.

MACAULAY, C. J.—Referring to the statutes mentioned at the argument—namely, 10 & 11 Vic. ch. 31, sec. 12–15 (which last was repealed by 12 Vic. ch. 1); 12 Vic. ch. 1, secs. 6, 7, 8, 9; 16 Vic. ch. 85, secs. 3–5. The 10 & 11 Vic. ch. 31, sec. 15 made the test when goods were dutiable according to their value the invoice value thereof at the place whence imported, with 10 per cent. added. The 12 Vic. ch. 1, sec. 6 enacted that when liable to duty *ad valorem* such value should be the actual cost value thereof in the principal markets in the country where the same were purchased, and whence they were exported to this province; and that the appraiser and collector should ascertain, estimate, and appraise the true and actual market value and wholesale price as aforesaid of any goods to be appraised, any invoice or affidavit to the contrary notwithstanding, in order to estimate and ascertain the value upon which duty was to be charged as aforesaid. This section was repealed by 16 Vic. ch. 85, sec. 3, part 2.

Sec. 7 requires invoices attested to be produced, and as

specified in sec. 8—that is, an invoice attested by the oath of the owner, importer, or consignee—according to the form and effect of the oath in schedule B., and in which the party denies knowledge of any other invoice, and that nothing to his knowledge is concealed or suppressed whereby the revenue may be defrauded of any part of the duty legally due on the goods; and, among other things, that to the best of his knowledge the invoice produced exhibited the actual cost or fair market cash value at the time the same were thence exported in the principal markets in (naming the country whence exported to this province, &c.) of the said goods. Explained by 16 Vic. ch. 85, sec. 5.

By sec. 9, he may add to the invoice such sum as may be sufficient to make the value for duty such as it ought to be under that act; and that no evidence of the value of any goods imported into this province, &c., at the place whence and the time when under that act they were to be deemed exported into this province, contradictory to or at variance with the value stated in the invoice rendered to the collector, with the additions, if any, made thereto, shall be received in any court in this province on the part of any party except the crown.

Sec. 11. If more than one owner, importer, or consignee of goods, any one of them cognizant of the facts may take the oath thereby required, which shall be sufficient, unless the goods shall not have been obtained by purchase in the ordinary way and some non-resident shall be the manufacturer or producer, &c.

16 Vic. ch. 85, sec. 3, clause 2nd, repealed the 12 Vic. ch. 81, sec. 6, and made the *ad valorem* test to be the fair market value thereof in the principal markets of the country whence the same were exported directly to this province, &c., in terms equivalent to the repealed clause, but using the words “to estimate and appraise the value for duty of such goods at the fair market value as aforesaid,” instead of those used in the repealed sections, and omitting the words “wholesale price.”

Sec. 5 explained 12 Vic. ch. 1, sec. 8. If required by the

collector, the invoice is to be attested by the oath of the owner or one of the owners, and of the importer or consignee, if the owners be not the person entering, and must be attested by the oath of the non-resident owner being the manufacturer or producer of such goods, in cases mentioned in the 11th section of 12 Vic. ch. 1, &c. The brooms in question were imported after the passing of the last act.

The *onus probandi* was thrown upon the claimant by 10 & 11 Vic. ch. 31, sec. 53, and by 12 Vic. ch. 81, sec. 29, and 16 Vic. ch. 85, sec. 8. These acts are to be construed as one with the 10 & 11 Vic. ch. 31, except in so far as their provisions are inconsistent—See *Reg. v. Hibbard* (3 U. C. R. C. 451).

Now, comparing the provisions of these statutes with the facts in evidence, I cannot entertain any doubt that the fair market value in the principal markets mean what they say, and that the true test of such value is not manufacturers' wholesale prices, but the sale prices in the marts of the country, if there be any difference. The wholesale value would, in relation to quantities entitled to be regarded as wholesale purchases, be the rule—at least, I think so; single articles, or a few only—such as would be regarded as retail purchases—would perhaps be governed by retail value or prices; but certainly there is nothing to indicate that the manufacturers' prices, or the lowest rate at which the goods could be obtained, was intended. The market value is a matter of fact; and here the question is, what was the fair market value of these brooms in the principal markets in the State of New York, or in those portions of the United States which border upon Upper Canada, at the time they were imported from Buffalo, in the State of New York, into the Port of Toronto? The jury have found the true or fair market value to exceed what the invoice submitted to the collector represented, and that they were so undervalued with the intention to avoid the payment of a part of the duty lawfully payable thereon.

Then, looking at the evidence, I find no reason to be dissatisfied with such finding. The defendants' circular, and the price McPherson & Co. agreed to give for the

brooms, exclusive of freight and charges and duties—in short, the defendants' price according to the circular, affords plain proof that the market value at Buffalo exceeded the value at which the goods were entered for duty.

It is too clear, I think, that the evasion of a portion of the duties estimated upon the market value of the goods was meditated and designed. The equivocal language used in some parts of the correspondence, and the obvious want of candor in others (when the facts come to be understood), seem irreconcilable with the *bona fides* which it leaves incumbent on the defendants to establish.

If it be said they were misled by former transactions, by the letter of McPherson & Co., and induced innocently to suppose that they could enter at manufacturers' prices, although not their own wholesale selling prices, and although their vendees here could not, the answer is, that nothing is shewn in relation to former practice to establish that the collectors of customs in this or other ports have knowingly, and as their construction of the statutes, admitted wholesale dealers abroad to enter goods for duty not at their wholesale prices, or at the wholesale or market value or price, but at the price given by such foreign dealers to the manufacturer abroad; and if it were shewn, no such practices could do away the plain construction and meaning of the statutes, however they might create a fit case for the equitable consideration of the government, if satisfied that foreign merchants meaning to act in accordance with our revenue laws had been misled by the inadvertence or misconstruction of its own officers; and as to the letter of McPherson & Co., it was calculated on the face of it to suggest the propriety of further inquiry, and upon a reference to the collector here, the defendants would have been undeceived as to the existence of any such privilege as the letter intimated.

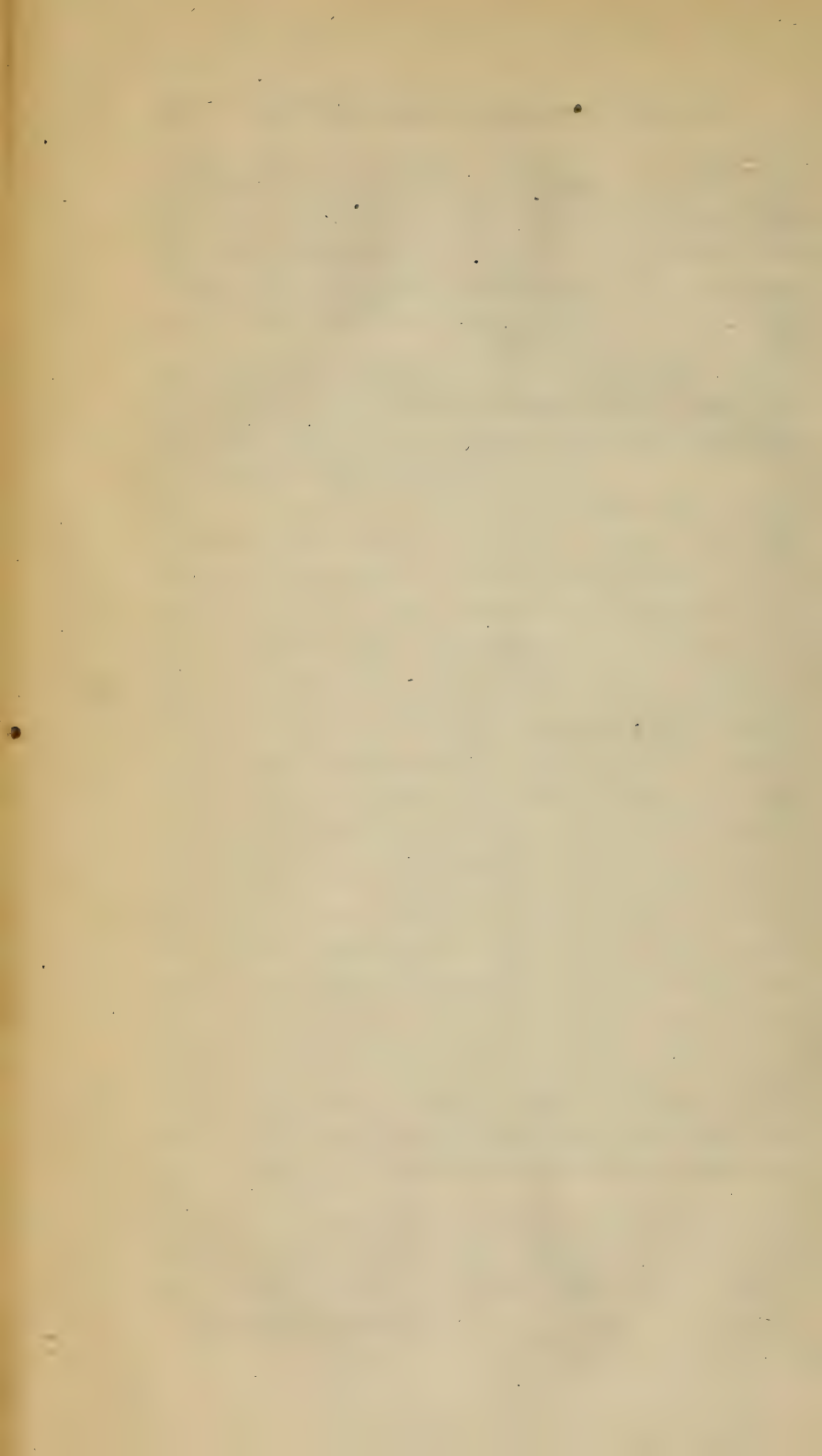
On the whole, therefore, notwithstanding the strong views expressed by the learned judge in leaving the case to the jury, I see no sufficient grounds for disturbing the verdict.

McLEAN, J., concurred.

RICHARDS, J.—I think the verdict in this case should stand. The evidence was quite sufficient to warrant the finding of the jury. The facts disclosed by the correspondence produced, and the letters of the defendants themselves, would lead to the conclusion that there was in law a fraudulent attempt to evade the payment of the duties by an undervaluation of the brooms.

I can hardly imagine that any amount of evidence of the class offered by the defendants at the trial would lead a jury to any other conclusion than the one already arrived at.

Per Cur.—Rule discharged.



A DIGEST

OF THE

CASES REPORTED IN THIS VOLUME.

ACCORD AND SATISFACTION.

Plea—That it was agreed between plaintiff and defendant that defendant should deliver to plaintiff, and that plaintiff should accept and receive, in full satisfaction and discharge, &c., certain promissory notes of a third person, amounting to, &c.; and that after making such agreement, and before suit—to wit, &c.—defendant then delivered to plaintiff, and plaintiff then accepted and received said promissory notes in full satisfaction and discharge, &c. Replication—That it was not agreed between plaintiff and defendant as in the plea alleged, nor did plaintiff accept or receive the promissory notes as therein alleged. *Held*, that the plea was sufficient; the delivery and acceptance of the negotiable promissory notes of a third person in satisfaction, though for a less sum in amount, is a good answer to the action in point of law: *Held*, also, that the replication was bad for duplicity. *Hanscombe v. Macdonald*, 190.

ACTION.

See NEGLIGENCE, 1.

AGREEMENT.

Plea of collateral, verbal.—That after the making of the said note, and while defendant was the holder, and

after it became due, and before the endorsement thereof afterwards mentioned—to wit, on, &c.—it was agreed between W. H. and defendant, in consideration of said W. H. conveying to defendant certain lands, the defendant should endorse, hand over, and transfer to said W. H. the said note in declaration mentioned, without defendant becoming answerable or liable for the payment of said note, by endorsing said note for the purpose of transferring the same to said W. H., and giving him the right of action against the maker, and that said W. H. should have no recourse against defendant in respect of such endorsement; and thereupon defendant, in pursuance of and in consideration of such agreement, and for and on no other account whatsoever, did then endorse the said note in blank to the said W. H., to enable him to recover and enforce the same against the maker; and said W. H. then took and received the same upon the terms and for the consideration and purposes aforesaid, and being then the holder of the note for the purposes and on the terms aforesaid, afterwards, and long after said note was due and payable, and before suit, delivered said note so endorsed in blank by defendant for the purposes aforesaid to plaintiff, who then took and received the same after the same had become due; and plaintiff now holds, and has always held, the

same upon the said terms, and upon no other terms whatever; and there never was any consideration for the endorsement of said note by defendant except as aforesaid; without this, that defendant did endorse the said note to the plaintiff *modo et forma* alleged. *Held*, that the plea was bad, on the ground that a collateral verbal condition or agreement varying the terms, or inconsistent with the legal import of the instrument, or of the endorsement thereof, cannot be pleaded in bar. *Hall v. Francis*, 210.

ALLOWANCE FOR ROAD.

See SURVEYS, 1.

APPRENTICE.

See PARTNERS, 1.

ATTACHMENT.

Irregularity of.] — Trespass for assault and false imprisonment. Defendants justified under a writ of attachment of contempt against plaintiff, to which plaintiff replied that the rule on which said writ of attachment issued was irregularly issued, and that the court, upon motion afterwards made by rule of the same court duly made, ordered that the said writ of attachment, and the said rule on which the same issued, and the arrest of plaintiff thereon, should be set aside, as having been obtained *ex parte*. On demurrer to the replication, on the ground that matters therein set forth are not sufficient to deprive the defendants of the protection of the writ—*Held*, that the replication was good; that the attachment, being set aside for irregularity, was displaced *ab initio*, and afforded no protection to defendants under it. *Reid v. Jones*, 424.

ATTORNEY.

See COUNSEL.

ASSIGNMENT.

See RELEASE.

Actual and continued possession.]

—An assignment of goods, &c., to plaintiffs, accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods transferred, is sufficient to give the assignment validity, and to protect the goods from execution creditors; and that in this case the transfer and change of possession being complete before the *Fi. Fa.* against goods at the defendants' suit was placed in the sheriff's hands, the plaintiffs were entitled to recover. *Taylor et al. v. Commercial Bank*, 447.

AWARD.

See PLEAS AND PLEADING.

Plea of.]—1. To a declaration in assumpsit for a breach of contract, the defendants pleaded in bar that certain differences having arisen between plaintiffs and defendants, such differences were referred to arbitration, and that the arbitrator made his award concerning the same; but the plea did not state the differences submitted and those which formed the ground of the present action were identical. *Held* bad on special demurrer, for not so doing. *Calvin et al. v. McPherson & Crane*, 150.

Proof of.]—2. Where a plaintiff proves such an award as he states in his declaration, its legal effect or validity is not involved under the plea of *nul tiel* award. *Hartley v. Huntley*, 276.

Validity of.]—3. An award directing that defendants should give to plaintiff a good endorsed negotiable promissory note is bad. *George v. Smith*, 291.

BANK TELLER.

Assumpsit by.]—Plaintiff was teller

of a bank at which a note of defendant's became due. Defendant paid in to plaintiff a sum of money, which was afterwards discovered to be £25 short, and plaintiff was compelled to make good the deficiency to the bank. *Held*, that plaintiff could recover against the defendant the amount paid by him in an action for money paid for defendant's use. *Rivers v. Roe*, 21.

BOND.

See EVIDENCE, 2.—CUSTOMS, 1.

Form of, to the Queen.]—Declaration on bond from O. M. and others to E. W., collector of customs, &c., for and on behalf of her Majesty, conditioned (after reciting the seizure of certain goods belonging to said O. M., that said O. M. was desirous of bonding said goods until the decision of the government should be made thereon) that if the seizure should not within thirty days be declared illegal by the governor in council, that then the obligors should pay to the said E. W., collector as aforesaid, or, &c., the sum of, &c. *Held*, that the bond was not good on the face of it, it being taken for and on behalf of the Queen, and no prescribed form of bond having been given by the statute. *Webster v. Macklem*, 266.

CAVEAT EMPTOR.

When applicable.]—Plaintiff (a merchant) having delivered cloth, &c., to be made up into coats, to a tailor, who made up cloth, &c., for plaintiff and others, and was also in the habit of exhibiting for sale and selling cloths on his own account, and he having sold the coats made of plaintiff's cloth to defendant—*Held*, that plaintiff was entitled to recover the coats from defendant, and that the maxim of *Caveat Emptor* applied. *Thompson v. Nelles*, 399.

CERTIFICATE.

See COUNTY COURT, 1.—HUSBAND AND WIFE, 1.

COMMISSIONER.

See RECOGNIZANCE OF BAIL, 1.

Authority of.]—A commission having been granted to a person to administer affidavits in the Midland district, which then included the present county of Prince Edward and the united counties of Frontenac, Lennox, and Addington, the county of Prince Edward being afterwards set aside as a separate district, and the commissioner at the time of such separation being resident in the united counties of Frontenac, Lennox, and Addington—*Held*, that his authority to administer affidavits in such united counties would continue. *McWhirter v. Corbett*, 203.

CONFESSION AND AVOIDANCE.

See PLEAS AND PLEADING.

Color, want of.]—To a declaration in trover the defendants pleaded that the plaintiff became indebted to them for goods; that he absented himself, leaving his wife to manage his business; that she delivered the goods in question to defendants towards the payment of plaintiff's debt to them; and that defendants, after the receipt of said goods, delivered the same to one Roe, to be by him kept for defendants; and that the said Roe, before the time when, &c., delivered these goods to plaintiff: wherefore defendants took said goods from plaintiff, which is the conversion complained of. *Held* bad, as not confessing a sufficient colorable title in plaintiff, and as amounting to an argumentative denial that plaintiff was possessed as of his own property, and because the facts stated in the plea could have been given in evidence under the general issue. *Monaghan v. Hayes*, 1.

CORPORATION.

Notice to appear.—1. A corporation aggregate is not bound to appear at the trial as witnesses under a notice served on their attorney under statute 16 Vic. ch. 19, sec. 2. *School Trustees v. McBeath*, 228.

Contractor with.—2. A contractor with a corporation to supply hydrants at certain points with water for public use, in the event of fires, is not liable for damages occasioned to the property of an individual rate-payer of the city by fire, owing to there not being a sufficient supply of water; their being no sufficient privity between such rate-payer and the contractor. *Cunningham v. Furniss*, 514.

Corporate seal, when necessary.—3. The trustees of a school section being a corporation under the statute 13 & 14 Vic. ch. 48, are not liable to pay for a schoolhouse erected for and accepted by them, not having contracted for the erection of same under seal. *Marshall v. School Trustees*, 373.

CROWN LAND RECEIPTS.

Effect of statute 16 Vic. ch. 159.—The plaintiff brings ejectment on a patent to himself for the south-west half of lot No. 12 in the 6th concession of Trafalgar, dated 22nd September, 1852; defendant puts in a receipt for the payment of the first instalment on the said lot from the commissioner of crown lands, dated 19th July, 1851. During the pending of this suit the statute 16 Vic. ch. 159, was passed. *Held*, that the statute 16 Vic. ch. 159 has the effect of repealing all former acts which gave any effect beyond the common law to the receipt, although the act was passed while the suit affected thereby was pending. *Armstrong v. Campbell*, 15.

COUNSEL.

A plaintiff is not bound by the in-

advertent statement or admission of his counsel in opening his case, such statement being promptly retracted by the attorney-general. *Jannette v. Great Western Railway Co.*, 488.

COUNTY COURT.

Certificate by.—A judge of the County Court has power to grant a certificate for speedy execution.—*McKay v. Hall*, 145.

CUSTOMS.

See BOND.

Entry of goods.—Defendants, residing in the United States, having contracted, by letter, with McP. & Co., of Toronto, to sell them brooms, laid down in Toronto duty free, shipped the brooms to Toronto, and sent an invoice to their agent in Toronto valuing them at or near manufacturers' prices, and much under the price at which they were sold to McP. & Co., the brooms being entered for duties at the custom-house, Toronto, at such under rate. *Held*, that such goods were liable to be seized, as being entered below the actual cash value in the markets of the country from which they were exported, and that such value was not to be taken to be the manufacturers' wholesale prices, but the sale prices in the markets from whence the goods were exported. *The Attorney-General v. Thompson*, 548.

DECLARATION.

See PLEAS AND PLEA.

Executed consideration.—Declaration stated that in consideration that plaintiff, at defendant's request, had sold to defendant a certain portion of plaintiff's lot, defendant then promised the plaintiff to allow him a passage or communication from the rear of plaintiff's lot to Brock-street, through the defendant's lot, whenever such lane or means of communication should be

laid out or required by plaintiff. *Held* bad on general demurrer, for that the executed consideration, though laid with a request, would not support the promise alleged. *Rees v. Howcutt*, 284.

Proof of allegation].—2. Declaration states that on, &c., an information on oath was laid before G. M., Esq., J. P., against T. J. for having within six months sold spirituous liquors to persons therein named, but unknown to plaintiff, and contrary to the statute in such case made and provided; that said M. summoned the said J., who appeared before said M., defendant, and other named justices; and that said justices having jurisdiction in the premises, convicted him of said offence, and adjudged that he had forfeited 25s.: whereupon it became their duty to return such conviction to the then next ensuing general quarter sessions of the peace in and for, &c.: yet defendant, not regarding his duty and the statute, did not make a return thereof in writing to the next ensuing quarter sessions, but neglected, contrary to the statute; whereby, and by force of the statute, he hath forfeited, &c., and an action hath accrued. *Held*, that proof of an offence against a by-law of the municipality, and a conviction under such by-law, was not sufficient proof of the allegations in the declaration. *Spillane v. Wilton*, 236.

Several breaches].—3. Where several breaches are assigned in a declaration, to which there is a demurrer, if any breach is well assigned, the plaintiff is entitled to judgment as to that breach. *Melville v. Carpenter*, 159.

Sufficiency of averment].—4. Declaration, after stating an agreement for the sale and purchase of from 1000 to 1500 bushels of peas, to be delivered by defendant at, &c., on or before the 15th of November next ensuing the date of said agreement, and that plaintiff should pay for said peas on the

12th of November, at the Bank of Upper Canada in Kingston,—averred that plaintiff on the 12th of November went to the Bank of Upper Canada during banking hours of that day, and was then ready and willing to pay defendant a large sum of money—to wit, &c.—as for the price of 1500 bushels of said peas, but that neither defendant nor any person on his behalf was at said bank at any time during the 12th of November to receive the said monies. *Held*, that such averment was sufficient on demurrer. *Platt v. McFaul*, 293.

DEEDS.

Covenant for title in].—Defendant agreed to sell to P. a lot of land for £150, and gave him a bond for a deed;—P. sold to O., who sold to plaintiff; and at his request defendant executed a deed in fee to plaintiff, the consideration therein expressed being £425, with covenants for seizin in fee; and plaintiff being dispossessed in an action on the covenant—*Held*, that plaintiff was entitled to recover the full consideration mentioned in the deed from defendant to him. *Graham v. Lesslie*, 170.

DEMURRER.

See PLEAS AND PLEADING.

DESCENT.

See HEIR AT LAW, 2.

DIVISION COURT.

Notice to bailiff of].—The bailiff of a Division Court acting in the discharge of his duty, as such, is entitled to notice of action under the division court acts, and that the objection is open to him under the plea of not guilty per statute. *Dale v. Cool et al.*, 460.

EVIDENCE.

See AWARD, 2.—MILL DAMS, 2.—PARTNERS.—PRACTICE.—SHERIFF'S SALE.

Proof of judgment.—1. Proof of a judgment and execution under which defendant justifies is admissible under the pleas of not guilty and not possessed. *Corbett v. Sheppard et al.*, 59.

Loss of bond.—2. The loss of a bond, &c., not being in issue, evidence may be given of its contents without proving the loss.

3. Defendant being security for plaintiffs' agent in the sum of £1,000, and the agent having misapplied a larger sum than the amount of the bond, but gave a mortgage to plaintiffs of certain lands which were sold under an order of the Court of Chancery, and the proceeds applied towards payment of the sum due, leaving a balance larger than the amount of defendant's bond—*Held*, that plaintiffs were entitled to apply the proceeds of the sale of the mortgaged lands in reduction of the general balance, and not in exoneration of the defendant's bond. *Commercial Bank v. Muirhead*, 434.

EXECUTOR.

See SCHOOL RATE.

EXECUTION.

See SHERIFF'S SALE.

Priority of.—A sheriff having seized the goods of a debtor under an execution, took a bond for the delivery thereof when required by the sheriff, and allowed the debtor to remain in possession of the goods and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution, at the suit of another creditor, was received by the sheriff, to which he returned *nulla bona*. *Held*, in an

action against the sheriff for a false return, that the second writ took precedence of the first and bound the goods, and that therefore the sheriff was liable. *Castle v. Ruttan*, 252.

FORGERY.

Surrender of prisoner.—A prisoner charged with forgery in Canada having been arrested in and surrendered by the government of the United States under the Ashburton Treaty, upon application for bail on the ground that there was no evidence of the *corpus delicto*—*Held*, that the surrender of the prisoner by the United States government was sufficient evidence. *Regina v. Van Aerman*, 238.

GUARANTEE.

Proof of, as laid.—Declaration—That—to wit, on, &c.—in consideration that plaintiffs would sell, deliver, and advance to D. C. goods between the day aforesaid and the 1st of April, 1852, defendants promised plaintiffs to be accountable for the payment of whatsoever goods the plaintiffs should sell, deliver, and advance to said D. C., on the understanding that their liability in respect of said goods was not to exceed £500, and that it should not be enforced until after three months' notice; and that defendants agreed that the making, endorsing, or renewing of any notes by defendants in payment for goods so to be advanced should not operate as a discharge of the said guarantee, any rule of law or equity to the contrary notwithstanding; setting forth the residue of the guarantee; and then avers that on sundry days and times between, &c., plaintiffs did sell, deliver, and advance to said D. C. goods amounting to £500: yet, &c. At the trial it was objected that the guarantee was not proved as laid, the declaration being as upon a single one, and the

proof of two. On motion for a nonsuit on this ground—*Held*, that the guarantee produced in evidence sustained the declaration as laid, and that there was no variance. *Ross v. Cameron*, 196.

HEIR-AT-LAW.

See WILLS, 1.

Conveyance by.—1. A deed by the heir-at-law to his mother of certain lands in lieu of dower is not to be considered as fraudulent and voluntary against subsequent purchasers for value, &c., although the consideration expressed in such deed be money, and no money in fact be proved to have been paid.

2. A will devising lands in Upper Canada having been made in Lower Canada, where testatrix lived, and being duly proved and enrolled among the records of the Court of King's Bench, and copies thereof directed to be made and given to the parties legally entitled thereto—*Held*, that an office copy of such will, duly certified, &c., was equivalent to letters probate in Upper Canada, and could be registered as such: *Held*, also, that the concluding words of the will in this case operate as a devise of the land in fee in trust to sell, &c., and break the descent. *Patulo v. Boyington*, 125.

HUSBAND AND WIFE.

Deed by.—1. A mortgage by husband and wife of the wife's lands having been registered without any acknowledgment of the wife of her willingness to part with her estate, as required by the statute, and the sheriff having, after such mortgage and registration thereof, sold and conveyed the husband's interest in the lands under a *Fi. Fa.*; and the deed to the purchaser was registered after the re-execution of the mortgage, and the due

acknowledgment by the wife, which mortgage, however, was not re-registered after such re-execution and acknowledgment—*Held*, that the interest of the husband in the land passed to the purchaser under the sheriff's deed to the exclusion of the mortgagee.

2. The interest of a husband in the freehold estate of his wife may be sold under a *Fi. Fa.* against lands. *Moffatt v. Grover*, 402.

IMPROVEMENTS.

See SURVEY.

When made under erroneous survey.—In ejectment defendant gave notice that he did not defend the title, but claimed compensation for his improvements, which were made on plaintiff's land in consequence of an erroneous survey made before the passing of the statute 12 Vic. ch. 35. *Held*, that defendant was entitled to the value of such improvements, although such survey was a private survey, and made on defendant's own account. *Campbell v. Ferguson*, 414.

INDICTMENT.

Right to challenge.—1. Upon the trial of a party indicted for misdemeanor, the Crown has a right to cause jurors to stand aside until the whole panel of jurors is gone through.

Joint indictment.—2. An indictment charging a misdemeanor against a registrar and his deputy jointly is good, if the facts establish a joint offence.

3. A deputy is liable to be indicted while the principal legally holds the office, and even after the deputy himself has been dismissed from office. *Regina v. Benjamin*, 179.

IRREGULARITY.

See ATTACHMENT, 1.—PRACTICE.

JUDGMENT.

Right to enter.]—Where a verdict was rendered against four defendants, but one afterwards had judgment on demurrer for mispleading given in his favor—*Held*, that plaintiff could enter judgment against three defendants, omitting the one who had judgment on demurrer. *Corbett v. Sheppard*, 68.

JUSTICE.

Notice of action to.]—In an action for a penalty against a defendant for acting as a justice of the peace, without qualification, &c., the defendant is not entitled to notice of action. *Crabb qui tam v. Longworth*, 283.

LANDLORD.

Right to distrain.]—A sheriff having seized goods under an execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested to do so, the landlord of the execution debtor having seized and sold the goods for rent due to him by the debtor; in an action of trover against the landlord—*Held*, that the sheriff had not at the time of the distress such a possession of the goods as precluded the landlord from distraining for rent. *McIntyre v. Stata et al.*, 248.

MARRIED WOMEN.

See HUSBAND AND WIFE.

Certificate of justices.]—A certificate under the provincial statute 2 Geo. IV. ch. 14, signed by the chairman and countersigned by the clerk of the peace, and endorsed on a deed, that on, &c., personally appeared C. B. within named, and being personally examined in the presence of, &c., justices of the peace, &c., touching her consent thereto, and did appear to

this court to give the same freely and voluntarily without any coercion on the part of her husband or any other person—*Held*, that such certificate, though deficient in form, was good in substance. *Jackson v. Robertson*, 272.

MILL-DAMS.

Apron or slide to dam.]—1. Plaintiff was possessed of a mill-dam across a small stream, down which the defendants wished to float saw-logs, &c., but that there being no apron or slide to the dam, as required by the statute 12 Vic. ch. 87, the defendants were unable to pass their logs, and therefore cut away a portion of the dam to enable them to do so—*Held*, that as the defendants were entitled under the statute to use the stream for the purpose of passing logs, they were justified in cutting away a portion of the dam to enable them to do so, doing no unnecessary damage; and that there being no evidence of excess, the court refused to set aside a verdict for defendants on that ground. *Little v. Ince et al.* 95.

Waste gates to.]—2. Declaration in case alleged, that defendant's dam was constructed in a careless, improper, unsafe, unskilful and inartificial manner, by means whereof, &c. *Held*, that the omission to provide necessary waste gates to facilitate the passage of the surplus water in freshets or floods is evidence of misconstruction, or improper or careless construction. *Mills v. Dixon*, 222.

MUNICIPALITY.

By-law, offence against.]—Declaration states that on, &c., an information on oath was laid before G. M., Esq., J. P., against T. J. for having within six months sold spirituous liquors to persons therein named, but unknown to plaintiff, and contrary to the statute in such case made and provided; that

said M. summoned said J., who appeared before said M., defendant, and other named justices; and that said justices, having jurisdiction in the premises, convicted him of said offence, and adjudged that he had forfeited 25s., whereupon it became their duty to return such conviction to the then next ensuing general quarter sessions of the peace in and for, &c.: yet defendant, not regarding his duty and the statute, did not make a return thereof in writing to the next ensuing quarter sessions, but neglected, contrary to the statute; whereby, and by force of the statute, he hath forfeited, &c., and an action hath accrued. *Held*, that proof of an offence against a by-law of the municipality, and a conviction under such by-law, were not sufficient proof of the allegations in the declaration. *Spillane v. Wilton*, 236.

NEGLIGENCE.

See PASSENGER.—RAILWAYS.

Case for.]—In an action for negligence against the owners of a steamboat, for injuries sustained by the plaintiff in consequence of one of the fenders having broke loose from the steamboat while in the act of leaving a wharf, and striking and injuring the plaintiff, who was standing on the wharf; and it appearing that the plaintiff had received warning to stand clear of the fenders, and that a person with ordinary care might have escaped, the court set aside a verdict for plaintiff, and granted a new trial on payment of costs. *Grieve v. Ontario Steamboat Co.*, 387.

NOTICE.

See DIVISION COURTS.—PRACTICE.—SHERIFF.

Sheriffs, when not entitled to.]—A sheriff is not entitled to notice of an action against him arising out of a

private suit. *McWhirter v. Corbett et al.*, 203.

NUISANCE.

See MILL-DAM.

PARTNERS.

Liability of surviving partner.]—A surviving partner is bound by the covenant of himself and his deceased partner to teach an apprentice the business, &c., until the end of the term for which he was apprenticed. *Connell v. Owen*, 113.

PASSENGER.

See RAILWAYS.

Plaintiff being a passenger in one of defendants' cars, the axle of the tender broke, and the tender and car in which plaintiff was were thrown off the track, whereby plaintiff's arm was broken. At the trial the defendants called the engineer of the train, who proved that he examined the axle shortly before the accident, when it appeared all right. The jury having found a verdict for the plaintiff upon this evidence, and with a charge favorable to defendants, the court refused to set it aside, on the ground that it was for the jury to determine whether there was negligence on the part of defendants or not. *Thatcher v. Great Western Railway Co.*, 543.

PATENT.

See CROWN LAND RECEIPT.

PLEAS AND PLEADING.

See ACCORD AND SATISFACTION.—AGREEMENT.—AWARD.—CONFESSION AND AVOIDANCE.—DECLARATION.—RELEASE.

Answer to part of declaration not specified.]—1. That before the time

limited for the completion of the work, &c., had expired, plaintiffs required certain alterations and variations, which said alterations, variations, and additions were made by defendants, and defendants were thereby delayed and hindered from the performance of the work within the time limited. The plaintiff in his declaration having alleged certain alterations and variations, but not in delay of the work, the plea was held bad, as attempting to alter the terms of the covenant declared on by matter subsequent to the sealing of the covenant not under seal. Breach—that neither was the work done and performed, nor were the said materials to the satisfaction of the architect named in the agreement. Plea—that plaintiff himself superintended, &c.; and that certain of the work performed, and certain of the materials provided by defendants, under the superintendence of plaintiff, were subsequently disapproved of by the architect. *Held* bad, as professing to answer the whole breach, but pleading only to a part not specified or defined. *Meville v. Carpenter*, 159.

Duplicity in.]—2. Plea—that while plaintiff was possessed and before the committing of the grievances in declaration mentioned, to wit, on &c., defendant and his wife recovered a judgment against plaintiff, and that a writ of *fi. fa.* was issued, directed to the sheriff, and that the sheriff under and by virtue of said writ levied execution on the goods and chattels in the declaration mentioned, which are the grievances alleged. Replication—That before the time when, &c., to wit, &c., plaintiff being lawfully possessed of said goods and chattels did mortgage the same to one O. D., to secure the payment of a sum of money then justly due and owing from plaintiff to said O. D., and that plaintiff, with consent of O. D., did remain in possession of the goods and chattels

as of his own lawful property, of all which the defendant had due notice, concluding as to the facts stated with a verification, and then new assigns that plaintiff, on the day and year in declaration mentioned, was possessed of other the goods and chattels in declaration mentioned not contained in or answered by the plea, and which said goods and chattels were other and different than the goods and chattels which were seized and levied in execution, and defendant B., with the other defendants, converted and disposed of the said other goods &c. in declaration mentioned, and herein newly assigned. On demurrer to the replication and new assignment, *Held* bad for duplicity, as together containing a double answer to the plea, and because the new assignment does not state what particular goods were covered by the plea and what not so covered. *Corbett v. Shepard*, 43.

Insufficiency of.]—3. That H. was the holder of the note when the same became due, and that while he was holder, and before said note was endorsed to plaintiff, and before suit, H. and defendants had divers accounts depending between them, and an account was then had and settled between them, such accounts including the promissory note in declaration mentioned; and that said H. had credit in such account for the amount of said promissory note; and that defendants upon such accounting were ascertained to be indebted to said H. in £54 4s. 9d.; and said H. being indebted to J. C. & Co. in £106, it was agreed between H. & J. C. (a partner of said firm of C. & Co.) that said H. should assign the amount so due from defendants to H. unto said J. C. in part payment of the debt due to said C. & Co.; and it was agreed between said H., defendants, and J. C., that said amount so due by defendants to H. should be paid by defendants to J. C. for and on ac-

count of C. & Co.'s debt, and that said H. should have no claim or right against defendants; and that H., with defendants' consent, did assign unto said J. C. the said amount so ascertained to be due from defendants to H., and did discharge the defendants from their liability to him; and defendants, in consideration of being so discharged, promised to pay J. C. said amount; and said J. C., on behalf of C. & Co., did agree to hold defendants liable to said C. & Co. for the amount so assigned, and to discharge said H., whereby defendants became relieved from their indebtedness to said H., and that after such assignment said note remained in the hands of said H., without consideration until plaintiff took same; and the endorsement thereof by said H. was in violation of good faith, and without consent of defendants or J. C.; and said note was endorsed to plaintiff, and he took same long after same became due, and after said amount so ascertained to be due from defendants to H. had been assigned, with full notice of the premises. *Held* bad—1st, for not shewing the christian names of said C. & Co., or alleging an excuse for not doing so; 2nd, that it cannot be presumed that Messrs. C. & Co. is the name of one person, therefore defendants should have set out their names in full; 3rd, it does not appear that H. was indebted to J. C. in his private capacity, and if he acted on behalf of C. & Co. it does not appear, and the promise is made by defendants to him alone; 4th, and as being double. *Murray v. Mountjoy et al.*, 169.

New assignment.—4. To a declaration on the common counts for goods sold, &c., defendant pleaded that the causes of action, if any, accrued against defendant and one Swallow; and that after the goods sold, &c., and before suit—to wit, on, &c.—by indenture made between defendant, then a part-

ner, and for and on behalf of the firm of Swallow & Irons, B. and H., and plaintiff and other creditors of said firm, in consideration of defendant assigning all his goods to B. and H., they agreed to pay the creditors seven shillings and sixpence in the pound on the amount of their respective claims, as set opposite their respective names in the schedule to said indenture annexed; and that defendant did assign to said B. & H.; and that they paid to plaintiff seven shillings and sixpence in the pound, who accepted and received the same in full satisfaction of all debts and claims, &c., against defendant from the beginning of the world to the day next before the date of said indenture, with an averment that the causes of action in declaration mentioned accrued in respect of debts, &c., in said indenture and schedule mentioned, and before the day next before the date of said indenture. To which plaintiff replied by traversing the averment that the causes of action accrued in respect of debts, &c. *Held* bad on demurrer, on the ground that the plaintiffs should have new assigned. *Held* also, a release by creditors to one of two partners of all actions and causes of actions, suits, debts, &c., which they have now or ever had or are entitled to in respect of any act, matter, or thing from the beginning of the world, is a release of individual as well as partnership liabilities. *Hall v. Irons*, 351.

Replication de injuriâ, when applicable.—5. To a declaration on a policy of insurance on plaintiff's goods, in which plaintiff averred that he had delivered an account stating the particulars of the loss and damage, signed by and verified by the oath of plaintiff, and was ready and willing to prove himself, &c., by such means as the defendants should reasonably require, and as far as it was in plaintiff's power to do according to the conditions of the policy; defendants pleaded that al-

though plaintiff did make oath of his loss, yet defendants say that although they did afterwards, and within a reasonable time thereafter, and before suit—to wit, on, &c.—require further and additional evidence of the amount and particulars of such loss and damage, being a proper and reasonable request in that behalf, yet plaintiff did not duly, properly, and reasonably prove his said loss and damage according to the form and effect of the condition of said policy. To this plea plaintiff replied *de injuriâ*. *Held*, on demurrer to the replication, that the plea was matter of excuse, and *de injuriâ* a good replication thereto. *Spencer v. Ontario Marine Insurance Co.*, 454.

Special traverse.—6. To a declaration in replevin, defendants made cognizance and justified; for that before the time when, &c., one O. D. was seized in fee of certain lands, being the same lands upon which defendants took said goods and chattels, &c., and being so seized, demised the same to plaintiff from year to year at £10 per year, and that plaintiff entered, &c.; and that after said tenancy had been so created, and after plaintiff had occupied said premises thereunder for upwards of two years—to wit, on, &c.—said O. D., by deed, conveyed the fee simple and reversion in said lands and premises to one G., who thereupon became seised and entitled to the rents then and thereafter to become due; and that said G. afterwards—to wit, on, &c.—whilst plaintiff was still holding under said demise, by deed conveyed the fee simple and reversion in said lands and premises to defendant, who thereupon became entitled to receive the rents then and thereafter to become due by virtue of the said demise; and that after the making of said last mentioned deed plaintiff continued to hold and enjoy the said lands and premises until the expiration of three years; and because £30 rent was in arrear and unpaid, defendants

justify, as landlord and bailiff, the taking of said goods, &c., as for and in the name of a distress for rent. Plea—That at the time of making of the alleged deed by the said O. D. to the said G., the said O. D. was disseised of said close in which, &c., and plaintiff then occupied the same, and claimed the fee simple thereof *absque hoc*; that the said O. D., by said deed, conveyed his reversionary estate or interest in said close in which, &c., to said Gwynne. *Held* bad on demurrer, on the ground that said plea sets up three separate and distinct answers to the avowry, &c. *Duffy v. Higgins et al.* 301.

Traverse of wrongful act.—7. A declaration in case stated that the plaintiffs were possessed of a certain warehouse, and that defendant in digging an excavation or cellar on the adjoining close did not use due care and skill, or take reasonable or proper precaution in and about digging the said cellar, but so carelessly, unskilfully and improperly behaved himself in the premises, that the said warehouse became injured, and the wall of the said warehouse sunk, gave way and fell in, by reason whereof divers goods of plaintiff were destroyed, &c. Plea—not guilty. *Held*, that the plea of not guilty merely traverses and puts in issue the wrongful act alleged, which in substance is the excavating so near the plaintiff's close without using necessary precautions to prevent accidents; that thereby the plaintiff's wall fell down; that if defendant means to assert a right to excavate up to the division line between the two closes he should have pleaded it specially. *Mitchell v. Harper*, 147.

PRACTICE.

See ATTACHMENT, 1.—JUDGMENT, 1.
VENUE, 1 and 2.

Notice of assessment.—1. Defen-

dants were let in to plead on terms of pleading at once, and taking one day's notice of trial. Pleas were accordingly filed and served; and replications thereto, each concluding to the country, were filed and served, and similiter added by plaintiff, and two days' notice of trial given. The record was entered on the assize day low on the docket, having been passed the day before; and on the following day defendants filed and served a demurrer to plaintiff's replication to one of defendants' pleas, which was entered on the record before the trial. Defendants moved to set aside verdict for plaintiff, on the ground that they were entitled to notice of assessment. *Held*, that they were not so entitled. *Spencer v. Ontario Marine Insurance Co.*, 454.

Notice of trial.—2. Notice of trial having been served on defendants too late, and there being contradictory statements as to the agreement to take short notice, the court set aside a verdict for plaintiff, and granted a new trial with costs. *Armstrong v. Beacon Insurance Co.*, 547.

PROMISSORY NOTE.

See BANK.—PLEAS, &c.

Averment of notice of presentment.]

—A declaration upon a promissory note, payable to defendant or order, averred that defendant then held the said note until, and at and after it became payable, by reason whereof notice of non-payment thereof to defendant became unnecessary and was dispensed with, and thereafter the defendant endorsed the said note to the plaintiff, and the said maker did not pay, &c., although the same was duly presented; of all which defendant had due notice. Second plea—That said note was not duly presented to the maker for payment thereof when the same became due as aforesaid, according to the tenor and effect thereof *modo et forma* alleged. Fifth plea—

That after the making of the said note, and while defendant was the holder, and after it became due, and before the endorsement thereof afterwards mentioned—to wit, on, &c.—it was agreed between W. H. and defendant, in consideration of said W. H. conveying to defendant certain land, that defendant should endorse, hand over, and transfer to said W. H. the said note in declaration mentioned, without defendant becoming answerable or liable for the payment of said note, by endorsing said note for the purpose of transferring the same to said W. H., and giving him the right of action against the maker, and that said W. H. should have no recourse against defendant in respect of such endorsement; and thereupon defendant, in pursuance of and in consideration of the said agreement, and for and on no other account whatsoever, did then endorse the said note in blank to the said W. H., to enable him to recover and enforce the same against the maker, and said W. H. then took and received the same upon the terms and for the considerations and purposes aforesaid; and said W. H. being then the holder of the said note for the purposes and on the terms aforesaid, afterwards, and long after said note was due and payable, and before suit, delivered said note so endorsed in blank by the defendant for the purposes aforesaid to plaintiff, who then took and received the same after the same had become due, and plaintiff now holds and has always held the same upon said terms, and upon no other terms whatsoever, and there never was any consideration for the said endorsement of the said note by defendant except as aforesaid; without this, that defendant did endorse the said note to the plaintiff *modo et forma* alleged. *Held*, that the declaration was good, the passage excusing the giving notice may be rejected as surplusage; and that the averment of the

note being duly presented, was sufficient on general demurrer. *Held* also, that the pleas were bad. *Hall v. Francis*, 210.

RAILWAY COMPANY.

See PASSENGER.—NEGLIGENCE.

Liability of.—1. A railway company is not responsible for damages occasioned by the negligence of sub-contractors in making the road where such damage was occasioned, by said sub-contractors doing acts which they were not required by their contract to do. *Woodhill v. Great Western Railway Co.*, 449.

Power of, to take lands.—2. The Great Western Railway Company is not authorized by the statute 4 Wm. IV. ch. 29 to enter upon and assume lands to be permanently appropriated to the uses of the railroad without the permission first obtained of the owner, or by reference under the statute. The defendants requiring certain lands of plaintiff for the purposes of their railroad, a sealed reference was entered into between the parties that the price or purchase money of the lands so required should be ascertained by arbitration; an award was accordingly made within the time limited by the reference awarding that the price or purchase money should be £503 15s., to be paid by defendants to plaintiff within three months from the date of the award, on plaintiff shewing a good title to, and executing and making, free from incumbrance, a proper and valid deed of conveyance of the land. The defendants entered into possession of the land under the reference, and with plaintiff's permission and assent, and built a portion of their works thereon with his knowledge; but he not being able to shew a good title to the land within the three months, there being a mortgage on part of the premises, the defendants did not pay the sum awarded, and the plaintiff, after the expira-

tion of the three months, refused to abide by the award or accept the sum awarded, and brought this ejectment. *Held*, that he could not treat the defendants as trespassers, and therefore the ejectment would not lie. *Rankin v. Great Western Railway Co.*, 463.

3. The Great Western Railway Company are not entitled to enter upon lands owned and possessed by a person, with the intention of permanently appropriating them for the purposes of their railroad, without the owner's permission or reference under the statute; and that defendants having entered upon plaintiff's land in defiance of him, for the purpose of permanently appropriating it, though such intention was afterwards abandoned, are liable in an action of trespass *quare clausum fregit*. *Jannette v. Great Western Railway Co.*, 488.

RECOGNIZANCE OF BAIL.

See COMMISSIONER.—VENUE, 2.

Amount of sum.—1. It is not necessary that the name of the principal debtor should be joined in a recognizance under the statute 10 & 11 Vic. ch. 15, nor that the specific sum should be mentioned therein as the amount for which the debtor was arrested.

Enrolment.—2. An allegation in a declaration upon a recognizance of bail, in the words "as by the said recognizance still remaining of record in the office of said deputy clerk of the crown for the county of, &c., more fully appears," is a sufficient averment of enrolment. *McFarlane v. Allen et al.* 438.

RELEASE.

To a declaration on the common counts, for goods sold, &c., defendant pleaded that the causes of action, if any, accrued against defendant and one Swallow; and that after the goods sold, &c., and before suit—to wit, on, &c.—

by indenture made between defendant, then a partner, and for and on behalf of the firm of Swallow & Irons, B. and H., and plaintiff and other creditors of said firm, in consideration of defendant assigning all his goods to B. and H., they agreed to pay seven shillings and sixpence in the pound on the amount of their respective claims as set opposite their respective names in the schedule to said indenture annexed; and that defendant did assign to said B. and H., and that they paid to plaintiff seven shillings and sixpence in the pound, who accepted and received the same in full satisfaction of all debts and claims, &c., against defendant from the beginning of the world to the day next before the date of said indenture, with an averment that the causes of action in declaration mentioned accrued in respect of debts, &c., in said indenture and schedule mentioned, and before the day next before the date of said indenture; to which plaintiff replied, by traversing the averment, that the causes of action accrued in respect of debts in said indenture and schedule mentioned, &c. *Held* bad on demurrer, on the ground that the plaintiff should have new assigned.—A release by creditors to one of two partners of all actions and causes of actions, suits, debts, &c., which they now have, or ever had, or are entitled to in respect of any act, matter, or thing from the beginning of the world, is a release of individual as well as partnership liabilities. *Hall v. Irons*, 351.

SEDUCTION.

Loss of service.—A declaration in case for seduction not containing an averment of loss by plaintiffs of the services of the person seduced, nor any averment that the person seduced was the servant of plaintiffs, is bad on demurrer.—A declaration by the mother for the seduction of her daughter is bad for not alleging the death of the

father. *Lake and Wife v. Beamiss*, 430.

2. The plea of not guilty in case for seduction does not deny or put in issue the allegation that the person seduced was the servant of the plaintiff. *Altaman v. Smith*, 500.

SET OFF.

In assumpsit on a promissory note, defendant pleaded set off, money lent, &c., and money due on a promissory note made by plaintiffs. At the trial it was in evidence that goods of the plaintiffs had been forwarded by defendant's steamboat, the amount of freight on which was disputed, and the warehouseman had by defendant's directions refused to deliver the goods till the freight claimed by him was paid; and the warehouseman having given up to the plaintiffs the goods, upon an order of defendant's agent to do so, taking their note for the amount of freight and charges claimed, which he did, and upon which note, since it became due, a portion was paid; and there being conflicting evidence as to whether such note was given conditionally subject to a future settlement, or as a final settlement of the freight, &c., the court set aside a verdict for plaintiffs, and granted a new trial with costs to abide the event. *Mellish v. Wilkes*, 407.

SCHOOL RATE.

Liability to.—A resolution of the freeholders and householders of a school section, passed at their annual meeting, that the trustees should tax the property in such section to pay the teacher's salary, &c., followed by a resolution of the trustees of such school section, directing a rate to be levied on the ratable property in said section to raise the sum required, and the preparation of rate-bills, &c., is sufficient to render a non-resident having rental

estate within such section liable for the sum rated by the school trustees of such section according to the assessed value of his real property; and that being so liable, defendant, as his executor and representing his estate, is liable in an action of the same nature to which the testator might have been subjected. *School Trustees v. McBeath*, 228.

SCHOOL TRUSTEES.

Resolution of.]—1. The communication by a board of school trustees to the municipal council of the town of a resolution of the board that the chairman do authorise the secretary of the board to notify the town council to furnish the board with a sum of money immediately for the purpose of purchasing a site for a schoolhouse and erecting a schoolhouse thereon, a copy of which resolution was sent to the town council, is not such a compliance with the provisions of the statute 13 & 14 Vic. ch. 48 as to render the town council liable to be compelled to pay the amount by mandamus. *School Trustees v. Town of Port Hope*, 418.

Resolution of.]—2. A resolution of the freeholders and householders of a school section, passed at their annual meeting, that the trustees tax the property in such section to pay the teacher's salary, followed by a resolution of the trustees of such school section directing a rate to be levied on the ratable property in said section to raise the sum required, and the preparation of rate-bills, &c., is sufficient to render a non-resident having real estate within such section liable for the sum rated by the school trustees of such section, according to the assessed value of his real property; and that being so liable, defendant, as his executor and representing his estate, is liable in an action of the same nature to which the testator might have been

subjected. *School Trustees, &c. v. McBeath*, 228.

SHERIFF.

See EXECUTION.—COMMISSIONER.—LANDLORD.

Notice of action.]—A sheriff is not entitled to notice of an action against him arising out of a private suit. *McWhirter v. Corbett et al.* 203.

SHERIFF'S SALE.

See EXECUTION.

Defendant, after the receipt of plaintiff's writ, received another writ, at the suit of one S., against the same debtor; and under which last writ the defendant seized a lot of land owned by such debtor, and upon which S. had a mortgage to secure the rent on a lease from him to the debtor, and that S.'s judgment was for arrears of rent secured by such mortgage; that S. bought the land for the amount of his judgment, and paid the sheriff's fees. At the trial, however, it did not appear whether defendant sold only the equity of redemption, or the debtor's interest, in the land, exclusive of the mortgage. The court set aside a verdict for defendant, and granted a new trial with costs to abide the event. *Young v. Baby*, 527.

SURVEYS.

See IMPROVEMENTS.

Side lines.]—In the township of Albion the lots in the different concessions were originally surveyed and laid out with double fronts, but the Adjala road, which forms the northern boundary of the township of Albion, cuts lots Nos. 30 and 31 in the 7th concession diagonally, leaving the eastern halves of these lots broken, and not corresponding with the front or western halves, and no posts or monuments

were placed to mark the angles of the east halves. *Held*, in appeal, that the side or division road between lots Nos. 30 and 31 should not run direct from one front to the Adjala road in a direct line, but that the side road should be run from each front to the centre of the lots. *McLachlan v. Dickson*, 307.

TAXES.

Sale for.]—A patent having issued for lot No. 8 and three-quarters of lot No. 7, and the east quarter of No. 7 being included in such grant, although not returned to the treasurer by the surveyor-general as described for grant, and the taxes on the whole of the grant having been paid, which payments the treasurer credited to the west three-quarters, and returned the east quarter as in arrear for taxes, upon which it was sold—*Held*, that the east quarter could not be sold for arrears, the payments having been made on the part which included the east quarter. *Peck v. Munro*, 363.

VENUE.

1. A declaration laying the venue in the United Counties of &c., is bad on special demurrer. *Nelson Road Co. v. Bates*, 281.

2. The venue in an action on a recognizance is correctly laid in the county in which the recognizance remains of record. *M'Farlane v. Allen*, 438.

WILLS.

Certified copy.]—A deed by the heir-at-law to his mother of certain lands in lieu of dower is not to be considered as voluntary and fraudulent against subsequent purchasers for value &c., although the consideration expressed in such deed be money, and no money in fact be proved to have been paid.—A will devising lands in Upper Canada having been made in Lower Canada, where testatrix lived, and being duly proved and enrolled among the records of the Court of King's Bench, and copies thereof directed to be made and given to the parties legally entitled thereto—*Held*, that an office copy of such will, duly certified, &c., was equivalent to letters probate in Upper Canada, and could be registered as such: *Held*, also, that the concluding words of the will in this case operate as a devise of the land in fee in trust to sue, &c., and break the descent. *Patulo v. Boyington*, 124.

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